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New Decisions Highlight Old Misgivings: A Reassessment of the Foreign Trade Antitrust Improvements Act Following *Minn-Chem*

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NEW DECISIONS HIGHLIGHT OLD MISGIVINGS: A
REASSESSMENT OF THE FOREIGN TRADE ANTITRUST
IMPROVEMENTS ACT FOLLOWING *MINN-CHEM*

*Robert D. Sowell**

Abstract

What role does the United States play in policing international commerce? At what point do the laws of the United States end and those of other nations begin? These questions, among others, arise in determining when U.S. antitrust laws apply to foreign conduct. Looking back, the Sherman Act, for some time, has applied to foreign conduct so long as that conduct satisfied certain requirements. However, common law tests proved inconsistent and difficult to apply. As a result, ninety-two years after the enactment of the Sherman Act, Congress intervened with the intent to clarify the common law by way of the Foreign Trade Antitrust Improvements Act (FTAIA). Unfortunately, congressional efforts failed.

Today, as international commerce flourishes and political borders figuratively dissipate, the questions become even more difficult. Federal courts attempting to apply the FTAIA have labored over the statute's difficult language and structure. The FTAIA bars the Sherman Act from applying to foreign conduct involving non-import commerce unless such conduct has an effect on domestic commerce and the effect gives rise to the plaintiff's injury. Therefore, the statute distinguishes between conduct, effect, and injury. The causal link between each distinction has been the subject of much debate. In 2005, the D.C. Circuit required a proximate cause relationship between the *effect* and *injury*. Similarly, a recent decision from the Seventh Circuit required a proximate cause nexus between the *conduct* and *effect*. In doing so, the Seventh Circuit highlighted an error within the D.C. Circuit's holding. This Note rejects the D.C. Circuit's interpretation and argues that a but-for nexus between the effect and injury adheres more correctly to the statute's text, legislative history, and international comity.

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INTRODUCTION

Few legal problems can withstand the test of time and overcome both judicial and legislative attempts at clarity. One such problem is the extraterritorial¹ application of American antitrust laws. Toward the end of the nineteenth century, Congress enacted the Sherman Act² in an attempt “to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade.”³ Shortly thereafter, the question arose: whether and to what extent U.S. antitrust laws extended to foreign conduct. The U.S. Supreme Court’s initial

1. See BLACK’S LAW DICTIONARY 666 (9th ed. 2009) (defining “extraterritorial” as “[b]eyond the geographic limits of a particular jurisdiction”).

2. Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1–7).

3. Charles A. Ramsay Co. v. Associated Bill Posters of U.S. & Canada, 260 U.S. 501, 512 (1923).

determination strictly limited the application of the Sherman Act abroad.⁴ However, subsequent case law muddled the waters. Indeed, common law rules ranged from Judge Learned Hand's "intended-effects" test in *United States v. Aluminum Co. of America (Alcoa)*⁵ to the balancing tests of the Third and Ninth Circuit Courts of Appeals⁶ that expanded upon *Alcoa*.

Ninety-two years after the enactment of the Sherman Act⁷ and seventy-three years after the first case dealing with the extraterritorial application of the Sherman Act reached the Court,⁸ Congress responded by enacting the Foreign Trade Antitrust Improvements Act (FTAIA) as part of the Export Trading Company Act of 1982.⁹ The FTAIA initially removes all foreign conduct involving non-import commerce from the reach of the Sherman Act.¹⁰ It then brings such conduct back within the reach of the Sherman Act if that conduct has a domestic effect and the effect gives rise to the plaintiff's injury.¹¹

The general rule removing non-import foreign conduct from the reach of the Sherman Act is deemed the "exclusionary rule,"¹² while the

4. *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 359 (1909).

5. 148 F.2d 416, 444 (2d Cir. 1945).

6. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297–98 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 549 F.2d 597, 613–14 (9th Cir. 1976).

7. 15 U.S.C. §§ 1–7 (2006) (originally enacted as Sherman Act, ch. 647, 26 Stat. 209 (1890)).

8. *See Am. Banana Co.*, 213 U.S. at 355–59 (addressing the plaintiff's claim that the defendant's conduct abroad violated the Sherman Act).

9. Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, §§ 401–03, 96 Stat. 1233, 1246–47 (codified at 15 U.S.C. § 6a). The text of the FTAIA provides, in pertinent part:

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

15 U.S.C. § 6a (2006).

10. *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155, 162 (2004).

11. *Id.*

12. *Id.* at 158.

provisions bringing such conduct back within the reach of the Sherman Act can be labeled the “domestic-injury exception.”¹³ The domestic-injury exception consists of two prongs. In short, prong one requires that the defendant’s conduct have a “direct, substantial, or reasonably foreseeable” effect on domestic or import commerce.¹⁴ Prong two requires that the effect from prong one “give[] rise to” a Sherman Act claim.¹⁵

Unfortunately, the FTAIA has done little to achieve its fundamental purpose of clarifying American antitrust law for “businessmen, attorneys and judges as well as our trading partners.”¹⁶ Rather, the FTAIA has merely added to the mounting confusion surrounding the application of American antitrust laws to foreign conduct.

Few significant opinions interpreting the FTAIA exist. The most important is *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I)*.¹⁷ There the Court held, among other things, that foreign injury independent of the alleged domestic effect is insufficient to satisfy the FTAIA’s domestic-injury exception, thereby removing such a claim from the purview of the Sherman Act.¹⁸ The Court based its decision on principles of international comity and the FTAIA’s language and history.¹⁹ On remand, the D.C. Circuit in *Empagran II* addressed whether the foreign injury was in fact independent of the domestic effect.²⁰ The court interpreted the second prong of the domestic-injury exception to require a proximate cause nexus between the foreign conduct’s domestic effects and foreign injury.²¹

Most recently, in *Minn-Chem, Inc. v. Agrium, Inc.*, the Seventh Circuit, sitting in an en banc panel of well-seasoned antitrust jurists, determined that the first prong of the domestic-injury exception also necessitates a proximate cause inquiry.²² According to the court, the term “direct,” within the “direct, substantial, and reasonably foreseeable” language, requires that there be a proximate cause nexus between the foreign conduct and domestic effect.²³

13. *Id.* at 159.

14. 15 U.S.C. § 6a(1) (2006).

15. *Id.* § 6a(2).

16. *See* H.R. REP. NO. 97-686, pt. 1, at 2–3 (1982) [hereinafter HOUSE REPORT].

17. 542 U.S. at 160–61 (granting certiorari to resolve a circuit split regarding interpretation of the FTAIA).

18. *Id.* at 173, 175.

19. *Id.* at 164, 169.

20. *Empagran S.A. v. F. Hoffman-La Roche, Ltd. (Empagran II)*, 417 F.3d 1267, 1269 (D.C. Cir. 2005).

21. *Id.* at 1270–71.

22. 683 F.3d 845, 857 (7th Cir. 2012) (en banc).

23. *Id.* at 856–57.

It has been clear since October 9, 1982 that Congress should revisit the FTAIA.²⁴ The case law following *Empagran II* added to the statute's shortcomings.²⁵ The Seventh Circuit's decision in *Minn-Chem* highlighted the fallacies, as well as corrected a number of other issues regarding FTAIA interpretation.

This Note describes the foundation for the development of case law regarding the extraterritorial application of U.S. antitrust laws. The analysis in Part I moves from the enactment of the Sherman Act, to the first case interpreting the extraterritorial reach of the Sherman Act, to the enactment of the FTAIA, and through significant cases interpreting the FTAIA. Thus, Part I establishes the need for the FTAIA but highlights Congress's failure to provide adequate guidance to the courts. Part II analyzes the Seventh Circuit's recent interpretations in *Minn-Chem* and notes the significance of the court's analysis of the statute's wording. Part III begins by highlighting a peculiar result of *Minn-Chem*'s and *Empagran II*'s interpretations of the statute and then evaluates the text of the FTAIA. This Note initially concludes that *Minn-Chem*'s interpretation as to prong one is correct, while *Empagran II*'s interpretation is at least questionable.

Part IV rejects the D.C. Circuit's interpretation of the second prong of the FTAIA's domestic-injury exception. By analyzing *Minn-Chem*'s use of a proximate cause standard in prong one, *Empagran II*'s use of the same standard is called into question. Proximate cause is not the correct standard for the second prong of the domestic-injury exception. Thus, this Note concludes by proposing that but-for causation is the correct standard for the second prong.

I. DEVELOPMENT OF EXTRATERRITORIAL APPLICATION OF THE SHERMAN ACT

The evolution of the extraterritorial application of U.S. antitrust laws warrants brief review for the purposes of this Note.²⁶ In 1890,

24. 15 U.S.C. § 6a (2006) (originally enacted Oct. 8, 1982).

25. See Joseph P. Bauer, *The Foreign Trade Antitrust Improvements Act: Do We Really Want to Return to American Banana?*, 65 ME. L. REV. 3, 16 (2012) (describing case law applying FTAIA in several circuits following *Empagran II*).

26. See generally *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1181–88 (E.D. Pa. 1980) (analyzing the history of the extraterritorial application of the Sherman Act); *Dominicus Americana Bohio v. Gulf & Western Indus., Inc.*, 473 F. Supp. 680, 687–88 (S.D.N.Y. 1979) (describing the history of extraterritorial application of the Sherman Act); Richard W. Beckler & Matthew H. Kirtland, *Extraterritorial Application of U.S. Antitrust Law: What Is a "Direct, Substantial, and Reasonably Foreseeable Effect" Under the Foreign Trade Antitrust Improvements Act?*, 38 TEX. INT'L L.J. 11, 12–13 (2003) (examining the history of territorial interpretation of the Sherman Act); Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285 (2007) (discussing the extraterritorial treatment of U.S. antitrust laws from enactment of Sherman Act

Congress enacted the Sherman Act, making illegal “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.”²⁷ The purposes of the Sherman Act have been described as “protect[ing] the public from the failure of the market”²⁸ and “put[ting] an end to great aggregations of capital.”²⁹

A. Early Application of the Sherman Act Abroad

Nineteen years after the enactment of the Sherman Act, the Supreme Court first dealt with the extent of the statute’s extraterritorial application. In *American Banana v. United Fruit Co.*,³⁰ the plaintiff, an Alabama Corporation, alleged that the defendant, a New Jersey corporation, engaged in anticompetitive behavior in Panama.³¹ As an initial matter, Justice Holmes noted that the “plaintiff’s case depends on several rather startling propositions,” namely, that the “acts causing the damage were done . . . outside the jurisdiction of the United States.”³² Following a brief mention of comity and legislative limitations, the Court held that “it [is] entirely plain that what the defendant did in Panama . . . is not within the scope of the [Sherman Act] so far as the

through 2007); Edward L. Rholl, *Inconsistent Application of the Extraterritorial Provisions of the Sherman Act: A Judicial Response Based on the Much Maligned “Effects” Test*, 73 MARQ. L. REV. 435 (1990) (discussing extensively the progression of varied judicial approaches to extraterritorial application of the Sherman Act); Sam Halabi, Note, *The “Comity” of Empagran: The Supreme Court Decides that Foreign Competition Regulation Limits American Antitrust Jurisdiction over International Cartels*, 46 HARV. INT’L L.J. 279, 280–88 (2005) (outlining the history of the extraterritorial application of the Sherman Act from 1909 through 2004); Evan Malloy, Note, *Closing the Antitrust Door on Foreign Injuries: U.S. Jurisdiction over Foreign Antitrust Injuries in the Wake of Empagran*, 38 TEX. TECH L. REV. 395, 401–04 (2006) (describing pre-FTAIA judicial treatment of extraterritorial antitrust claims); Kelly L. Tucker, Note, *In the Wake of Empagran—Lights out on Foreign Activity Falling Under Sherman Act Jurisdiction? Courts Carve out a Prevailing Standard*, 15 FORDHAM J. CORP. & FIN. L. 807, 808–20 (2010) (analyzing the history of extraterritorial jurisdiction in U.S. antitrust law).

27. 15 U.S.C. § 1 (2006).

28. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

29. *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 428 (2d Cir. 1945); see also *Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 569 n.6 (1982) (describing congressional intent in enacting the Sherman Act as “a desire to enhance competition” (citing *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688, 691 (1978))); *Fond du Lac Bumper Exch., Inc. v. Jui Li Enter. Co.*, 795 F. Supp. 2d 847, 850 (E.D. Wis. 2011) (“[T]he purpose of the Sherman Act is to protect consumers and businesses in the American marketplace from injuries arising from anticompetitive activity.”); Bauer, *supra* note 25, at 5 (describing the goals of antitrust laws as “enhancement of consumer welfare, the promotion of competition, and compensation of the victims of antitrust violations”).

30. 213 U.S. 347 (1909).

31. *Id.* at 354.

32. *Id.* at 355.

present suit is concerned.”³³ Even though both the plaintiff and defendant were domestic entities, U.S. courts lacked jurisdiction over the Sherman Act claim because the allegedly anticompetitive conduct occurred abroad.³⁴

1. The Erosion of *American Banana*

Sometimes labeled as the “territoriality test,”³⁵ the Court’s narrow approach toward extraterritoriality in *American Banana* was soon to be eroded. Just two years after *American Banana*, in *United States v. American Tobacco Co.*, the Court held foreign corporations liable under the Sherman Act for an illegal combination consisting of both American and foreign entities.³⁶ Similarly, in 1913, the Supreme Court found U.S. and Canadian companies liable under the Sherman Act where the companies monopolized a transportation route from the United States to Canada and Alaska,³⁷ limiting freight and passengers to one continuous line of common carriers.³⁸ In 1917, in *Thomsen v. Cayser*, the Court found antitrust liability where the defendants formed an unlawful combination in a foreign country to control shipping rates between New York and South Africa.³⁹

In 1927, the Court explicitly refused to apply *American Banana*.⁴⁰ In *United States v. Sisal Sales Corp.*, the government sought, by “an excellent example of bad pleading,” to enjoin five U.S. corporations, a Mexican corporation, and various individuals from continuing

33. *Id.* at 357. An important factor in the Court’s limited application was that, while a nation’s laws may govern its citizens in territories lacking sovereign authority, the laws of Costa Rica governed the territory where the conduct occurred. *Id.* at 355–56 (“[I]n regions subject to no sovereign . . . countries may treat some relations between their citizens as governed by their own law . . .”).

34. *Id.* at 357; cf. Naomi Harlin Goodno, *When the Commerce Clause Goes International: A Proposed Legal Framework for the Foreign Commerce Clause*, 65 FLA. L. REV. 1139, 1168 (2013) (arguing that “congressional power to regulate foreign commerce” has always been consistently broad).

35. See, e.g., *United Phosphorous, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003) (en banc) (labeling *American Banana*’s rule as a “territorial test”), *overruled on other grounds by* *Minn-Chem v. Agrium, Inc.*, 683 F.3d 845, 852 (7th Cir. 2012) (en banc); Rholl, *supra* note 26, at 438 (referring to the “territoriality test”).

36. 221 U.S. 106, 182–83 (1911).

37. Alaska did not become a state until 1959. See Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958).

38. *United States v. Pac. & Arctic Ry. & Navigation Co.*, 228 U.S. 87, 90–92 (1913).

39. 243 U.S. 66, 68–69, 88 (1917) (noting that because “the combination affected the foreign commerce of th[e] [United States] and was put into operation [in the United States],” the defendants were amenable to U.S. antitrust law).

40. *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275–76 (1927) (distinguishing *American Banana* and noting that in *American Banana*, the plaintiff based its claim on “acts done outside the United States and not unlawful by the law of the place”).

monopolistic practices over importation and sale in sisal, a fiber used in making binder twine.⁴¹ The anticompetitive conduct occurred in both Mexico and the United States.⁴² Because the defendants “brought about forbidden results within” the United States, the Court reversed the dismissal of the complaint.⁴³ Although *Sisal Sales* did not explicitly overrule *American Banana*, later opinions have recognized *Sisal Sales* as *American Banana*’s final demise.⁴⁴

2. *Alcoa* and the Intended-Effects Test

Some years later, Judge Hand, in *United States v. Aluminum Co. of America (Alcoa)*,⁴⁵ established the “intended-effects test,”⁴⁶ which became the standard in determining the extraterritorial reach of the Sherman Act for years to come.⁴⁷ In *Alcoa*, a Swiss corporation was formed pursuant to an agreement in 1931 among six signatories: a French corporation, two German corporations, a Swiss corporation, a British corporation, and a Canadian corporation.⁴⁸ Subsequently, a 1936 agreement required that supply restrictions target the United States.⁴⁹ Thereafter, the United States brought an action under § 1 of the Sherman Act, and the district court held for the defendants.⁵⁰

On appeal, Judge Hand construed the issue as “whether Congress

41. *Id.* at 271–74.

42. *Id.* at 276.

43. *Id.*

44. See *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400, 407–08 (1990) (“[W]hatever [*American Banana*] said by way of dictum . . . has not survived *Sisal Sales*.”); see also *Dominicus Americana Bohio v. Gulf & Western Indus., Inc.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979) (“[H]istory has proven *American Banana* not to be a seminal decision but an aberration: it is apparently the only foreign trade antitrust case lost by the Department of Justice for want of jurisdiction.”).

45. 148 F.2d 416 (2d Cir. 1945). Because “there [was] wanting a quorum of six Justices qualified to hear” the case in the Supreme Court, the appeal from the district court was certified and transferred to the Second Circuit. *United States v. Aluminum Co. of Am.*, 322 U.S. 716, 716 (1944) (transferring to the United States Circuit Court of Appeals for the Second Circuit).

46. *Alcoa*, 148 F.2d at 444. Others have referred to *Alcoa*’s test simply as the “effects test.” See, e.g., *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 393 (2d Cir. 2002), *abrogated by Empagran I*, 542 U.S. 155 (2004); *Den Norske Stats Oljeselskap As v. Heeremac Vof*, 241 F.3d 420, 424 n.12 (5th Cir. 2001); *Coors Brewing Co. v. Miller Brewing Co.*, 889 F. Supp. 1394, 1397 n.9 (D. Colo. 1995); *‘In’ Porters v. Hanes Printables, Inc.*, 663 F. Supp. 494, 497 (M.D.N.C. 1987). To avoid confusion with prong one of the FTAIA’s domestic-injury exception, this Note refers to *Alcoa*’s rule as the “intended-effects” test.

47. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292 (3d Cir. 1979) (“This wide-reaching ‘intended-effects’ test has been cited with approval by the Supreme Court.” (citing *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1962))).

48. *Alcoa*, 148 F.2d at 442.

49. *Id.* at 442–43.

50. *Id.* at 443–45.

chose to attach liability to the conduct outside the United States of persons not in allegiance to it.”⁵¹ The court cited *American Banana* for the proposition that courts should not attribute a legislative intent to hold parties liable for conduct that has no effect within the United States.⁵² Therefore, the court established a two-part test, requiring both intent and domestic effect.⁵³ The court determined that the intent element was satisfied, because the 1936 agreement expressly sought to subject U.S. imports to supply restrictions.⁵⁴ “[A]fter the intent to affect imports was proved, the burden of proof shifted to [the defendant].”⁵⁵ The question then became whether the quantity restrictions had any effect on domestic prices for aluminum.⁵⁶ Presuming that any agreement removing from the market a substantial supply of a good would undoubtedly have an effect on prices, the court held that the 1936 agreement violated § 1 of the Sherman Act.⁵⁷

Following *Alcoa*, the question of whether U.S. antitrust laws applied to foreign conduct depended upon “the situs of the *effects* as opposed to the *conduct*.”⁵⁸ It was “abundantly plain that some extraterritorial application of the Sherman Act [was] proper.”⁵⁹ However, the intended-effects test has resulted in varied approaches and much confusion.

In *Timberlane Lumber Co. v. Bank of America, N.T. and S.A.*, the Ninth Circuit significantly honed the intended-effects test. Writing for the court, Judge Herbert Choy determined that the “effects test by itself is incomplete because it fails to consider other nations’ interests.”⁶⁰ Likewise, the test fails to account for the relationship between the parties and the United States.⁶¹ The court adopted a “tripartite analysis,”⁶² with the third inquiry based on “comity and fairness,” balancing a number of factors:

[T]he degree of conflict with foreign law or policy, the

51. *Id.* at 443.

52. *Id.* (noting that “it is safe to assume” that Congress did not intend the Sherman Act to apply to situations where foreign conduct had an effect but was unintentional).

53. *Id.* at 444.

54. *Id.*

55. *Id.*

56. *Id.* at 445.

57. *Id.*

58. HOUSE REPORT, *supra* note 16, at 5 (emphasis added).

59. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1185 (E.D. Pa. 1980).

60. *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 611–12 (9th Cir. 1976).

61. *Id.* at 612.

62. *Id.* at 613. The first step focused on whether the conduct affected or intentionally affected foreign commerce of the United States. *Id.* at 615. The second inquiry analyzed the “type and magnitude” of the restraint. *Id.*

nationality or allegiance of the parties and the locations or principal places of businesses of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.⁶³

The Third Circuit's decision in *Mannington Mills Corp. v. Congoleum Corp.* mirrored Judge Choy's reasoning in *Timberlane*, save for a difference in procedural approach and the inclusion of additional factors.⁶⁴ Procedurally, *Mannington Mills* provided for a presumption of jurisdiction,⁶⁵ followed by a comity analysis considering "whether jurisdiction *should* be exercised."⁶⁶ *Timberlane* treated the comity

63. *Id.* at 614.

64. *Mannington Mills Corp. v. Congoleum Corp.*, 595 F.2d 1287, 1292, 1294, 1297–98 (3d Cir. 1979). The factors to be considered under the Third Circuit's analysis included:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nations has addressed the issue.

Id. at 1297–98 (footnote omitted).

65. *See id.* at 1292 ("[W]hen two American litigants are contesting alleged antitrust activity abroad that results in harm to the export business of one, a federal court does have subject matter jurisdiction." (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 113 n.8 (1969))).

66. *Id.* at 1294 (emphasis added); *see also* Huffman, *supra* note 26, at 300 (labeling the Third Circuit's discretionary approach as a "prudential standing" inquiry). The Seventh Circuit, in *In re Uranium Antitrust Litigation*, followed the Third Circuit's lead. 617 F.2d 1248, 1253 (7th Cir. 1980). In *In re Uranium Antitrust Litigation*, the court outlined a two-pronged test, first determining "(1) does subject matter jurisdiction exist; and (2) if so, should it be exercised?" *Id.* In response to amici contentions that the intended-effects test is no longer settled law, following

analysis as part of the determination of subject-matter jurisdiction.⁶⁷

On the brink of congressional intervention, the Fifth Circuit, in *Industrial Investment Development Corp. v. Mitsui and Co., Ltd.*,⁶⁸ noted that comity concerns should be included when applying the intended-effects test.⁶⁹ However, the court expressly rejected the notion from *Timberlane* that comity concerns are evaluated as part of determining subject-matter jurisdiction.⁷⁰ Similarly, the court disagreed with decisions that have determined a comity analysis to be discretionary.⁷¹

B. *The Foreign Trade Antitrust Improvements Act*

In light of the mounting confusion regarding the extraterritorial application of U.S. antitrust laws, congressional intervention seemed inevitable.

1. Congressional Intervention: Enactment of the FTAIA

In 1982, the 97th Congress enacted the Foreign Trade Antitrust Improvements Act, as § 7 of the Sherman Act.⁷² The statute provides:

Sections 1–7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions

Mannington Mills and *Timberlane*, the court confirmed that the intended-effects test is embodied in prong one. *Id.* at 1254–55.

67. *Timberlane Lumber Co.*, 549 F.2d at 613. *But see In re Uranium Antitrust Litig.*, 617 F.2d at 1255 (imposing, incorrectly, the holding of *Mannington Mills* onto an interpretation of *Timberlane*: “[t]he clear thrust of the *Timberlane* Court is that once a district judge has determined that he has jurisdiction, he should consider additional factors to determine whether the exercise of that jurisdiction is appropriate” (footnote omitted)).

68. 671 F.2d 876, 884 & n.7 (5th Cir. 1982), *vacated*, 460 U.S. 1007 (1983).

69. *Id.* at 884.

70. *Id.* at 884 n.7.

71. *Id.* (disagreeing “with the suggestion in *In re Uranium Antitrust Litigation* that the question whether to entertain the suit is discretionary with the trial judge” (citation omitted)).

72. Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, §§ 401–03, 96 Stat. 1233 (codified at 15 U.S.C. § 6a).

of sections 1 to 7 of this title, other than this section.⁷³

According to the oft-quoted language of Justice Stephen Breyer, the FTAIA “lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act’s reach. It then brings such conduct back within the Sherman Act’s reach *provided that* the conduct . . . (1) sufficiently affects American commerce, . . . *and* (2) has an effect of a kind that antitrust law considers harmful.”⁷⁴ In essence, the FTAIA creates a general exclusionary rule and then provides a domestic-injury exception⁷⁵ to the general rule.⁷⁶ The domestic-injury exception contains two prongs that correspond to the two sections of the statute.⁷⁷ Prong one requires that the foreign conduct have “a direct, substantial, and reasonably foreseeable effect” on domestic commerce, and prong two requires that the effect from prong one “give[] rise to a [Sherman Act] claim.”⁷⁸

The explicit objectives of the FTAIA are to “encourage the business community to engage in efficiency-producing joint conduct in the export of American goods and services” and to create a singular, objective test for applying the Sherman Act to foreign conduct.⁷⁹ Congress sought to create a “clear benchmark . . . for businessmen, attorneys and judges as well as *our trading partners*.”⁸⁰ In analyzing the

73. 15 U.S.C. § 6a (2006).

74. *Empagran I*, 542 U.S. 155, 162 (2004); *see also* 1 EARL W. KINTNER ET AL., FEDERAL ANTITRUST LAW: A TREATISE ON THE ANTITRUST LAWS OF THE UNITED STATES § 7.3, at 21–22 (Supp. 2012) [hereinafter 1 KINTNER TREATISE] (quoting the same proposition).

75. *See Empagran I*, 542 U.S. at 159 (referring to the exception to the general exclusionary rule as the “domestic-injury exception”); *In re Dynamic Random Access Memory Antitrust Litig. (DRAM)*, 546 F.3d 981, 987 (9th Cir. 2008) (calling the exception to the general exclusionary rule the “domestic-injury exception”); *cf. In re Vitamin C Antitrust Litig.*, 904 F. Supp. 2d 310, 316–17 (E.D.N.Y. 2012) (referring to a “domestic effects exception”); *Fond du Lac Bumper Exch. v. Jui Li Enter. Co.*, 795 F. Supp. 2d 847, 851 (E.D. Wis. 2011) (referring to a “domestic-injury exception”); *In re Transpacific Passenger Air Transp. Antitrust Litig.*, 2011 WL 1753738, at *4 (N.D. Cal. May 9, 2011) (calling the rule the “domestic injury exception”); *In re Static Random Access Memory Antitrust Litig. (SRAM)*, 2010 WL 5477313, at *2 (N.D. Cal. Dec. 21, 2010) (referring to a “domestic-injury exception”).

76. *See Empagran I*, 542 U.S. at 158–59, 162; *see also supra* notes 12–15 and accompanying text.

77. *Id.* at 158–59.

78. *Id.* at 158.

79. HOUSE REPORT, *supra* note 16, at 2–3; *cf. Huffman, supra* note 26, at 304–05 (noting three goals of the FTAIA: to alleviate concerns over the scope of extraterritorial application, to ease tension between the United States and its trading partners, and to articulate a standard for extraterritorial application).

80. HOUSE REPORT, *supra* note 16, at 2–3 (emphasis added). References to “our trading partners” implies deference toward foreign entities and foreign sovereigns; therefore, while the Third, Seventh, and Ninth Circuit balancing tests have seemingly been removed from analysis, comity considerations are alive and well. *See id.* at 13 (“[T]his bill would have no effect on the

second legislative purpose, the Judiciary Committee reiterated that Judge Hand's standard in *Alcoa* remained the predominant legal standard.⁸¹ However, significant disparity over the "quantum and nature of the effects required to create jurisdiction" has resulted among the courts.⁸²

While necessary and noble in purpose, the FTAIA has done little to resolve the confusion regarding extraterritorial application of U.S. antitrust laws. Indeed, Professor Max Huffman states that the FTAIA "has failed at its essential purpose."⁸³ In reference to the FTAIA, Professor Joseph Bauer writes, "It keeps getting worse and worse."⁸⁴ Professor Chris Sagers labels the statute as "notoriously difficult to read."⁸⁵ Judge Diane Sykes of the Seventh Circuit describes the FTAIA as "awkwardly phrased,"⁸⁶ and lastly, Judge Susan Illston of the Northern District of California states that "the FTAIA operates in a peculiar fashion."⁸⁷

2. From Disregard to Confusion: Early FTAIA

Over ten years after the enactment of the FTAIA, the Supreme Court, in *Hartford Fire Insurance Co. v. California*, granted certiorari "to address the application of the Sherman Act to the foreign conduct at issue."⁸⁸ In *Hartford Fire*, the plaintiffs, nineteen states and a number of private parties, alleged that the defendants, London reinsurers of commercial general liability insurance, had engaged in conspiracies that

courts' ability to employ notions of comity." (citing *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976))). This Note contends, *infra* Section III.B., that the term "substantial" within the first prong of the domestic-injury exception includes a comity analysis.

81. HOUSE REPORT, *supra* note 16, at 5.

82. *Id.*

83. Huffman, *supra* note 26, at 286.

84. Bauer, *supra* note 25, at 4.

85. Interview by Lauren Chang, Managing Editor of Competition Policy Int'l, with Chris Sagers, Professor of Law, Cleveland-Marshall Coll. of Law (audio file at 0:03:40) (July 2012) [hereinafter CPI Interview], available at <http://www.competitionpolicyinternational.com/assets/Free/Interview-Potash-II.mp3>.

86. *Minn-Chem, Inc. v. Agrium, Inc.*, 657 F.3d 650, 658 (7th Cir. 2011), *vacated*, 684 F.3d 845 (7th Cir. 2012).

87. *In re TFT-LCD Antitrust Litig.*, 822 F. Supp. 2d 953, 956 (N.D. Cal. 2011); *see also* *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997) (labeling the FTAIA as "inelegantly phrased"); *McLafferty v. Deutsche Lufthansa A.G.*, 2009 WL 3365881, at *2 (E.D. Pa. Oct. 16, 2009) (describing the language of the FTAIA as "somewhat inartfully stat[ed]").

88. 509 U.S. 764, 779 (1993). In a post-FTAIA case dealing with antitrust liability for foreign conduct, the Court avoided an FTAIA inquiry, summarily stating that "[r]espondents cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) (citing *Alcoa*, 148 F.2d 416, 443 (2d Cir. 1945)).

affected American policyholders.⁸⁹ The District Court for the Northern District of California dismissed the claims as to the foreign defendants, invoking comity concerns and applying *Timberlane*.⁹⁰ The Ninth Circuit reversed.⁹¹ Also applying its decision in *Timberlane*, the Ninth Circuit determined that five of the six “comity factors of *Timberlane*” necessitated an exercise of jurisdiction, whereas only one factor (the degree of conflict with British law) weighed in favor of abstention.⁹² Accordingly, international comity did not prohibit the exercise of Sherman Act jurisdiction.⁹³

In determining subject-matter jurisdiction, the Supreme Court initially avoided the language of the FTAIA and deferred to *Alcoa*’s intended-effects test.⁹⁴ Because the complaint alleged that the London reinsurers “engaged in unlawful conspiracies to affect the market for insurance in the United States,” subject-matter jurisdiction existed.⁹⁵ The foreign defendants contended that the district court should not exercise jurisdiction for international comity reasons.⁹⁶ However, because no conflict existed between British and American laws for the purposes of the present litigation, “international comity would not counsel against exercising jurisdiction in the circumstances alleged here.”⁹⁷ Therefore, the Court affirmed the decision of the Ninth Circuit and extended subject-matter jurisdiction to the foreign defendants.⁹⁸

Justice Antonin Scalia dissented as to the extraterritorial application of the Sherman Act.⁹⁹ He separated the inquiry into two distinct issues: “whether the District Court had jurisdiction, and whether the Sherman

89. 509 U.S. at 795.

90. *In re Ins. Antitrust Litig.*, 723 F. Supp. 464, 490–91 (N.D. Cal. 1989), *rev’d*, 938 F.2d 919, 934 (9th Cir. 1991).

91. *In re Ins. Antitrust Litig.*, 938 F.2d at 934.

92. *Id.*

93. *Id.* at 932–34.

94. *Hartford Fire*, 509 U.S. at 796 (“[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”). While it seems strange that the Court initially avoided the statutory language, the Court’s analysis may very well be appropriate as the FTAIA sought to codify the intended-effects test of *Alcoa*. See HOUSE REPORT, *supra* note 16, at 5; see also *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 315 F.3d 338, 345 (D.C. Cir. 2003), *vacated*, *Empagran I*, 542 U.S. 155 (2004). But cf. *Hartford Fire*, 509 U.S. at 796 n.23 (expressing uncertainty as to whether the FTAIA codifies the common law standard).

95. *Hartford Fire*, 509 U.S. at 796.

96. *Id.* at 797. In response, the Court noted that upon enactment of the FTAIA, “Congress expressed no view on the question of whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity.” *Id.* at 798. But see *supra* note 80 (arguing that the legislative history explicitly indicates an intent to incorporate comity concerns).

97. *Hartford Fire*, 509 U.S. at 798–99.

98. *Id.* at 799.

99. *Id.* at 800 (Scalia, J., dissenting).

Act reaches the extraterritorial conduct alleged here.”¹⁰⁰ Because the plaintiffs alleged a federal question, the first issue, labeled “adjudicative jurisdiction,”¹⁰¹ was easily disposed of.¹⁰² As to the second issue, the proper inquiry was whether the authority of the sovereign permitted application of its law to particular conduct.¹⁰³ Justice Scalia employed two canons of statutory construction to determine the reach of the Sherman Act.¹⁰⁴ Antitrust case law rebuts the first canon, the presumption against extraterritoriality, and extends the Sherman Act abroad.¹⁰⁵ The second canon is that courts should not interpret an act of Congress to conflict with the “laws of nations” or “customary international law.”¹⁰⁶ Within this realm, notions of “prescriptive comity” arise and are to be afforded attention in determining whether Congress has the authority to apply U.S. law to the foreign conduct.¹⁰⁷ Thus, according to Justice Scalia, the parties failed to “make a clear distinction between adjudicative jurisdiction and the scope of the statute” and applied an incorrect comity standard.¹⁰⁸

Subsequently, the Court revisited the FTAIA in *Empagran I*.¹⁰⁹ In the district court, the plaintiffs, foreign and domestic purchasers of vitamins, alleged that the defendants, foreign and domestic vitamin distributors and manufacturers, had engaged in a price-fixing conspiracy and thereby increased prices in the United States and abroad.¹¹⁰ As to the foreign plaintiffs, corporate purchasers domiciled in Ecuador, Panama, Australia, and Ukraine, none had purchased vitamins within the United States.¹¹¹ Rather, the plaintiffs alleged that the defendants engaged in a global price-fixing conspiracy and that as a result, the

100. *Id.* at 812.

101. *See id.* at 820.

102. *Id.* at 812 (stating that “28 U.S.C. § 1331 vests district courts with subject-matter jurisdiction over cases ‘arising under’ federal statutes”).

103. *Id.* at 813 (“This refers to ‘the authority of a state to make its law applicable to persons or activities,’ and is quite a separate matter from ‘jurisdiction to adjudicate.’” (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 401 (1987) (Part IV Jurisdiction and Judgments: Introductory Note))).

104. *Id.* at 813–14.

105. *Id.* at 814.

106. *Id.* at 814–15 (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 118 (1804)).

107. *Id.* at 817. Justice Scalia defined “prescriptive comity” as “the respect sovereign nations afford each other by limiting the reach of their laws.” *Id.*

108. *Id.* at 820.

109. *Empagran I*, 542 U.S. 155, 158 (2004).

110. *Id.* at 159–60.

111. *Id.* The district court opinion outlines a broader array of foreign defendants. *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 2001 WL 761360, at *1 (D.D.C. June 7, 2001) (“Plaintiffs in this case represent foreign corporations domiciled in Ecuador, Panama, Australia, Mexico, Belgium, the United Kingdom, Indonesia, and the Ukraine . . .”), *rev’d*, 315 F.3d 338, 341 (D.C. Cir. 2003), *vacated Empagran I*, 542 U.S. 155, 175 (2004).

plaintiffs had to pay inflated prices for vitamins abroad.¹¹² Applying the FTAIA, the District Court for the District of Columbia dismissed the foreign plaintiffs' claims for lack of subject-matter jurisdiction, because "[p]laintiffs have not alleged that the precise injuries for which they seek redress here have the requisite domestic effects necessary to provide subject matter jurisdiction over this case."¹¹³ Subsequently, the domestic purchasers transferred their claims, and the foreign purchasers appealed.¹¹⁴

On appeal, the D.C. Circuit construed the issue to be whether the second prong of the domestic-injury exception of the FTAIA (governing the relationship between the effect and injury) "authorizes subject matter jurisdiction where the defendant's conduct affects both domestic and foreign commerce, but the plaintiff's claim arises only from the conduct's foreign effect."¹¹⁵ After analyzing the statute's language, structure, history, and additional relevant policy, the D.C. Circuit reversed the dismissal.¹¹⁶ Therefore, the court held that subject-matter jurisdiction existed even where the foreign injury is independent of a domestic effect.¹¹⁷

In the Supreme Court, Justice Breyer focused on the second prong of the domestic-injury exception and narrowed the issue to "how th[e] language [of the FTAIA] applies to price-fixing activity that is in significant part foreign, that has the domestic effect, and that also has *independent* foreign effects giving rise to the plaintiff's claim."¹¹⁸ The Court held that the domestic-injury exception of the FTAIA did not apply, and therefore subject-matter jurisdiction was lacking.¹¹⁹ Justice Breyer articulated two reasons for this holding.¹²⁰ First, citing Justice Scalia's dissent in *Hartford Fire*, the "Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."¹²¹ Second, the FTAIA specifically

112. *Empagran S.A.*, 2001 WL 761360, at *1.

113. *Id.* at *3–4.

114. *Empagran I*, 542 U.S. at 160.

115. *Empagran S.A.*, 315 F.3d at 344, *vacated*, *Empagran I*, 542 U.S. 155 (2004).

116. *Id.* at 341, 357.

117. *Id.* at 341.

118. *Empagran I*, 542 U.S. at 162 (emphasis added). The Court granted certiorari to resolve a circuit split between the Fifth, *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 426 n.19, 430–31 (5th Cir. 2001) (holding that the defendants' conduct must give rise to the *plaintiffs'* particular claim) and Second Circuits, *Sniado v. Bank Austria AG*, 352 F.3d 73, 77–78 (2d Cir. 2003) (holding that the defendants' conduct must give rise to *a* claim, not necessarily the plaintiffs' claim) as to whether the domestic effects of prong one must give rise to plaintiff's specific claim or simply any claim. *Empagran I*, 542 U.S. at 160–61; *see also* Halabi, *supra* note 26, at 283–85 (outlining the circuit split).

119. *Empagran I*, 542 U.S. at 164, 166–67.

120. *Id.* at 164.

121. *Id.* (citing *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J.,

sought to clarify, not expand, the Sherman Act's scope regarding foreign commerce.¹²² In response to the plaintiffs' linguistic arguments, the Court determined that the language of the second prong, "gives rise to a claim,"¹²³ implies that the effect must give rise to the "plaintiff's claim" or "the claim at issue."¹²⁴ Therefore, because the plaintiffs' injury was independent of the domestic effect, subject-matter jurisdiction did not exist.¹²⁵

On remand to the D.C. Circuit in *Empagran II*, Judge Karen Henderson addressed the plaintiffs' alternate theory, regarding the requisite nexus between the domestic effect and foreign injury.¹²⁶ The plaintiffs argued that their foreign injury was not, in fact, *independent* of the domestic effect but that "maintaining super-competitive prices in the United States" caused their foreign injury.¹²⁷ Seemingly out of thin air, Judge Henderson rejected "but-for" causation as a sufficient nexus and adopted proximate cause as the required relationship between the domestic effect and foreign injury.¹²⁸ According to the court, allowing for a broader standard would bring into question the comity concerns that the court sought to avoid.¹²⁹ Therefore, applying the proximate cause standard to the second prong, the D.C. Circuit determined that "the domestic effects the appellants cite did not give rise to their claimed injuries so as to bring their Sherman Act claim within the FTAIA exception."¹³⁰

dissenting)). While courts have regularly allowed for U.S. antitrust laws to reach foreign conduct with a domestic effect, the Court determined that application where a foreign injury is independent of the domestic effect violates basic principles of prescriptive comity, in sharp contrast to *Hartford Fire's* avoidance of comity considerations. *Id.* at 165–66.

122. *Id.* at 169.

123. 15 U.S.C. § 6a(2) (2006) (emphasis added).

124. *Empagran I*, 542 U.S. at 174.

125. *Id.* at 175.

126. *Empagran II*, 417 F.3d 1267, 1268 (D.C. Cir. 2005).

127. *Id.* at 1270.

128. *Id.* at 1271 ("The statutory language—'gives rise to'—indicates a direct causal relationship, that is, proximate causation, and is not satisfied by the mere but-for 'nexus' that [plaintiffs] advanced in their brief."). Others have been equally disturbed by the lack of justification for adopting a proximate cause standard. See Erica P. Siegmund, Note, *Extraterritoriality and the Unique Analogy Between Multinational Antitrust and Securities Fraud Claims*, 51 VA. J. INT'L L. 1047, 1062–64 (2011).

129. *Empagran II*, 417 F.3d at 1271.

130. *Id.* *Empagran II* and its progeny have continued to require a proximate cause standard for the second prong of the domestic-injury exception, and in doing so, such decisions have continued to find a lack of subject-matter jurisdiction where plaintiffs allege injury based on an arbitrage theory. See *DRAM*, 546 F.3d 981, 987 (9th Cir. 2008); *In re Monosodium Glutamate Antitrust Litig. (MSG)*, 477 F.3d 535, 538–39 (8th Cir. 2007); *In re Hydrogen Peroxide Antitrust Litig.*, 702 F. Supp. 2d 548, 553 (E.D. Pa. 2010); *Latino Quimica-Amtex S.A. v. Akzo Nobel Chem. B.V.*, 2005 WL 2207017, at *8 (S.D.N.Y. Sept. 8, 2005).

II. THE FTAIA IN 2012: CLARITY FROM THE SEVENTH CIRCUIT

More recently, the Seventh Circuit grappled with the FTAIA. In *Minn-Chem, Inc. v. Agrium, Inc.*, the plaintiffs were U.S. companies that were direct and indirect purchasers of potash, a mineral or chemical salt primarily used in agricultural fertilizers.¹³¹ The defendants were entities from Canada, Russia, Belarus, and the United States that “market, sell, and distribute potash.”¹³² The plaintiffs alleged that the defendants were the primary members of an international cartel that “restrained global output of potash in order to inflate prices.”¹³³ Allegedly, the defendants fixed prices in Brazil, China, and India, and used those prices as benchmarks to drive up prices in the United States.¹³⁴ Because demand for potash is inelastic,¹³⁵ the defendants could increase prices significantly.¹³⁶ Therefore, while fertilizer prices remained steady between 2003 and 2008, potash prices increased more than 600%.¹³⁷

The district court denied the defendants’ motion to dismiss for lack of subject-matter jurisdiction.¹³⁸ In its opinion, the district court paved the way for interlocutory appeal under 28 U.S.C. § 1292(b) and eventually certified two questions to the Seventh Circuit, including whether the complaint alleged conduct that fell within the FTAIA’s domestic-injury exception.¹³⁹ In the Seventh Circuit, the initial panel vacated the district court’s order and instructed the district court to grant the defendants’ motion to dismiss on remand.¹⁴⁰ Just over two months later, the Seventh Circuit granted the plaintiffs’ petition for rehearing en banc.¹⁴¹

131. *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 848 (7th Cir. 2012) (en banc).

132. *Id.* at 848–49.

133. *Id.* at 849.

134. *Minn-Chem, Inc. v. Agrium, Inc.*, 657 F.3d 650, 656 (7th Cir. 2011).

135. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 730 (3d. ed. 1993) (defining “elastic” as “enlarging or decreasing readily in demand in response to changes in price”).

136. *Minn-Chem*, 683 F.3d at 849; cf. *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907, 916 (N.D. Ill. 2009), *aff’d sub nom.* *Minn-Chem, Inc.* 683 F.3d 845, (“[D]emand for potash is elastic; as potash prices increase, buyers tend to purchase at the higher price, rather than decrease the amount of their purchases.” (emphasis added)). The district court seems to have misconstrued “elasticity.” In fact, because demand remains unchanged in lieu of price increases, demand for potash is inelastic.

137. *Minn-Chem*, 683 F.3d at 849.

138. *In re Potash Antitrust Litig.*, 667 F. Supp. 2d at 927.

139. *Id.* at 937; *Minn-Chem*, 657 F.3d at 656–57.

140. *Minn-Chem*, 657 F.3d at 663–64. The panel decision adopted the Ninth Circuit’s definition of “direct,” requiring that a domestic effect be an “immediate consequence” of the foreign conduct. *Id.* at 661–62. As a result, the court held that the allegations in the complaint were insufficient to satisfy the Ninth Circuit’s definition. *Id.* at 663–64.

141. *Minn-Chem, Inc. v. Agrium, Inc.* No. 10-1712 (7th Cir. Dec. 1, 2011) (order granting

Judge Diane Wood, writing for the Seventh Circuit sitting en banc, approached three critical issues regarding the FTAIA.¹⁴² The first involved whether the FTAIA is a jurisdictional or substantive requirement.¹⁴³ The second entailed the treatment of import commerce, and the third involved the causal relationship between the anticompetitive conduct and the domestic effect.¹⁴⁴

A. Merit-Based Limitation

As to the first issue, the court focused on whether the FTAIA constituted a jurisdictional requirement or merely an element of a Sherman Act claim.¹⁴⁵ Broadly speaking, the court considered whether Congress was exercising its Article III power to determine jurisdiction of the lower courts or whether it was using its Article I power to regulate interstate commerce. The en banc court held that “the FTAIA sets forth an element of an antitrust claim, not a jurisdictional limit on the power of the federal courts.”¹⁴⁶ Therefore, the statute goes not to a court’s jurisdiction over a claim involving foreign conduct; rather, the statute is relevant to the merits of a Sherman Act claim.¹⁴⁷

The previous panel decision recognized that, in light of two recent Supreme Court decisions in *Morrison v. National Australian Bank, Ltd.*¹⁴⁸ and *Arbaugh v. Y & H Corp.*,¹⁴⁹ the issue was ripe for reconsideration.¹⁵⁰ Regardless, the panel chose not to decide the issue, as the complaint could properly be dismissed for failure to state a claim.¹⁵¹ However, upon rehearing en banc, Judge Wood revisited the issue.¹⁵² The court followed the lead of the Third Circuit in *Animal Science Products, Inc. v. China Minmetals Corp.*¹⁵³ and relied on the

petition for rehearing en banc); see *Minn-Chem*, 683 F.3d at 848.

142. *Minn-Chem*, 683 F.3d at 851, 854, 856; see also 1 KINTNER TREATISE, *supra* note 74, § 7.3, at 25 (explaining that the *Minn-Chem* court “reinterpreted FTAIA on three critical issues”); CPI Interview, *supra* note 85 (audio file at 0:00:52) (noting that the *Minn-Chem* decision is “really . . . three opinions”).

143. *Minn-Chem*, 683 F.3d at 851–53.

144. *Id.* at 856–58.

145. *Id.* at 851–53.

146. *Id.* at 852.

147. *Id.*

148. 130 S. Ct. 2869, 2876–77 (2010) (holding that extraterritorial application of § 10(b) of the Securities Exchange Act necessitates a merits inquiry: “to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question”).

149. 546 U.S. 500, 515–16 (2006) (holding that Title VII’s employee-numerosity requirement, 42 U.S.C. § 2000e(b), “is an element of a plaintiff’s claim for relief, not a jurisdictional issue”).

150. *Minn-Chem, Inc. v. Agrium, Inc.*, 657 F.3d 650, 657–59 (7th Cir. 2011).

151. *Id.* at 659.

152. *Minn-Chem*, 683 F.3d at 851.

153. 654 F.3d 462, 467–68 (3d Cir. 2011), *overruling* *Turicentro, S.A. v. Am. Airlines*,

Supreme Court's newfound aversion to "drive-by jurisdictional" rulings.¹⁵⁴ Specifically, Judge Wood wrote that "[t]he Supreme Court's decision in *Morrison*, we believe, provides all the guidance we need to conclude that" the FTAIA reaches the merits of the claim and does not represent a jurisdictional hurdle.¹⁵⁵ The court thereby overruled its en banc ruling in *United Phosphorus v. Angus Chemical*,¹⁵⁶ issued nine years earlier.¹⁵⁷

In justifying its decision, the court stated that "[w]hen Congress decides to strip the courts of subject-matter jurisdiction . . . it speaks clearly."¹⁵⁸ Furthermore, the court determined that the statute does not approach the use of the term "jurisdiction."¹⁵⁹ It is important to note that while the statute avoids any explicit reference to a court's jurisdiction, the legislative history certainly does reference the court's jurisdiction.¹⁶⁰ In fact, upon enacting the FTAIA, the Judiciary Committee mentioned

Inc., 303 F.3d 293, 300–02 (3d Cir. 2002), and *Carpet Grp. Int'l v. Oriental Rug Imps. Ass'n*, 227 F.3d 62, 69, 70–73 (3d Cir. 2000). Less than a year before *Minn-Chem*, the Third Circuit reached a similar conclusion regarding whether the FTAIA was a jurisdictional or substantive requirement. *Animal Sci.*, 654 F.3d at 466. Distinguishing between "legislative jurisdiction" and "judicial jurisdiction," the Third Circuit held that the FTAIA constitutes "a substantive merits limitation rather than a jurisdictional bar." *Id.* at 467–69. In enacting the FTAIA, the Third Circuit determined that Congress was exercising its Commerce Clause authority to delineate the merits of an antitrust claim rather than its Article III authority to determine the jurisdiction of the lower federal courts. *Id.*

154. *Minn-Chem*, 683 F.3d at 852. See generally Howard M. Wasserman, *The Demise of "Drive-By Jurisdictional Rulings"*, 105 NW. U. L. REV. 947, 947 (2011) (outlining the Court's "multi-Term effort towards better defining which legal rules properly should be called 'jurisdictional'"); Edward Valdespino, Note, *Shifting Viewpoints: The Foreign Trade Antitrust Improvements Act, a Substantive or Jurisdictional Approach*, 45 TEX. INT'L L.J. 457 (2009) (analyzing the history and the pre-*Animal Science* shift in interpretations of the FTAIA as a jurisdictional requirement); Daniel Wotherspoon, Comment, *The "Element" Surprise: The Third Circuit Bucks the Foreign Trade Antitrust Improvements Act Trend in Animal Science Products, Inc. v. China Minmetals Corp.*, 57 VILL. L. REV. 785 (2012) (considering the Third Circuit's recent treatment of the FTAIA as a substantive requirement). But cf. *Bowles v. Russell*, 551 U.S. 205, 214–15 (2007) (holding that time requirements within FED. R. APP. P. 4(a)(6) are jurisdictional; because petitioner failed to file a timely appeal, the appellate court lacked jurisdiction).

155. *Minn-Chem*, 683 F.3d at 852; see also *In re TFT-LCD Antitrust Litig.*, 822 F. Supp. 2d 953, 959 (N.D. Cal. 2011) ("This Court agrees with the Third Circuit that application of the 'clearly states' test necessitates the finding that the FTAIA does not affect subject matter jurisdiction." (citing *Animal Sci.*, 654 F.3d at 468–69)); cf. *Lotes Co. v. Hon Hai Precision Indus. Co.*, 2013 WL 2099227, at *7 (S.D.N.Y. May 14, 2013) (noting that the Second Circuit, post-*Morrison*, has not yet determined that the FTAIA represents a merits requirement, as opposed to a subject-matter jurisdiction requirement); *In re Vitamin C Antitrust Litig.*, 904 F. Supp. 2d 310, 315 (E.D.N.Y. 2012) (same).

156. 322 F.3d 942, 952 (7th Cir. 2003) (en banc).

157. *Minn-Chem*, 683 F.3d at 848, 852.

158. *Id.* at 852.

159. *Id.*

160. See HOUSE REPORT, *supra* note 16, at 2 (first mentioning "jurisdiction").

“jurisdiction” over twenty times in its report,¹⁶¹ even referring to the FTAIA as a “jurisdictional test.”¹⁶² In its own words, “This bill only establishes the standards necessary for assertion of United States antitrust jurisdiction. The substantive antitrust issues on the merits of the plaintiffs’ claim would remain unchanged.”¹⁶³ Furthermore, the very nature of the FTAIA as an extraterritorial provision logically evokes notions of jurisdiction. One cannot envision, absent explicit statutory reference, a clearer congressional intent to affect a court’s subject-matter jurisdiction, and according to Judge Hand’s opinion in *Alcoa*, on issues of extraterritoriality, Congress’s intent is the determining factor.¹⁶⁴ Regardless, Judge Wood clung to the language within the statute to determine that the statute referenced “conduct,” a merits question, not a jurisdictional question.¹⁶⁵

On first glance, the procedural and substantive repercussions of the recharacterization seem minimal. However, implications for both plaintiffs and defendants may be significant.¹⁶⁶ In the Seventh Circuit, plaintiffs will be affected because complaints will be attacked under Federal Rule of Civil Procedure 12(b)(6), as opposed to 12(b)(1). Therefore, a complaint will be subject to the heightened pleading requirements of *Ashcroft v. Iqbal*¹⁶⁷ and *Bell Atlantic Corp. v. Twombly*.¹⁶⁸ Defendants will be affected because the burden now rests with the defendant to challenge a complaint under a 12(b)(6) motion¹⁶⁹ or a motion for summary judgment.¹⁷⁰ Previously, defendants proceeded under a 12(b)(1) motion, where the burden rested with the plaintiff to demonstrate subject-matter jurisdiction.¹⁷¹ Moreover, if the plaintiff withstands a 12(b)(6) attack, the defendant must now proceed with a lengthy and intrusive discovery process before moving for summary

161. *Id. passim*.

162. *Id.* at 9. Similarly, the report from the Judiciary Committee uses the term “jurisdictional” three times. *Id.* at 9, 12.

163. *Id.* at 11.

164. *See supra* Subsection I.A.2.

165. *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 852 (7th Cir. 2012) (en banc).

166. *See* *Wotherspoon*, *supra* note 154, at 801–05 (analyzing the impact and policy considerations of the Third Circuit’s parallel decision).

167. 556 U.S. 662, 678 (2009).

168. 550 U.S. 544, 555 (2007).

169. *Iqbal*, 556 U.S. at 678 (stating that, in evaluating a complaint for failure to state a claim, “a court must accept as true all of the allegations contained in a complaint” (citing *Twombly*, 550 U.S. 554, 555 (2007))).

170. FED. R. CIV. P. 56 (placing burden on the “movant”).

171. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (“[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.” (citation omitted) (internal quotation marks omitted) (quoting *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) and *Warth v. Seldin*, 422 U.S. 490, 518 (1975))).

judgment. Lastly, the recharacterization affects courts, as they may no longer raise sua sponte an FTAIA deficiency based on lack of subject-matter jurisdiction.¹⁷²

B. Import Commerce

The second issue addressed in *Minn-Chem* involved the FTAIA's treatment of import commerce. First, the opening phrase¹⁷³ provides that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations."¹⁷⁴ Therefore, import commerce is understood to fall squarely within the confines of the Sherman Act and need not be subject to an FTAIA inquiry.¹⁷⁵ Judge Wood rejected the Third Circuit's characterization of an "import exception" and provided that "[i]mport trade and commerce are excluded at the outset from the coverage of the FTAIA in the same way that domestic interstate commerce is excluded."¹⁷⁶ In essence, the statutory language implies that import trade or commerce has a per se domestic effect, and courts need not waste their time stumbling through the FTAIA provisions. As a reason for the exemption, the court noted that "applicability of U.S. law to transactions" in U.S. import trade or commerce is "fully predictable to foreign entities and necessary for the protection of U.S. consumers."¹⁷⁷

Provided that import trade or commerce is fully amenable to the Sherman Act and not subject to the FTAIA, the court exerted additional effort in defining "import commerce."¹⁷⁸ In doing so, the court isolated the alleged conduct between "foreign sellers and domestic buyers" and noted that "transactions that are directly between the [U.S.] purchasers and the [foreign] cartel members *are* the import commerce of the United States in this sector."¹⁷⁹ Interestingly, the court nonetheless required that the conduct in import commerce satisfy the requirements of *Alcoa* and

172. *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 853 (7th Cir. 2012) (en banc).

173. *Id.* at 854 (referring to the opening phrase as the "chapeau").

174. 15 U.S.C. § 6a (2006).

175. *Minn-Chem*, 683 F.3d at 854; *see also* HOUSE REPORT, *supra* note 16, at 10 ("It is thus clear that wholly foreign transactions as well as export transactions are covered by the amendment, but that import transactions are not.").

176. *Minn-Chem*, 683 F.3d at 854; *see also* CPI Interview, *supra* note 85 (audio file at 0:04:44) (noting a "point of tension" between the Seventh and Third Circuits regarding characterization of the statute's treatment of import commerce).

177. *Minn-Chem*, 683 F.3d at 854.

178. *Id.* at 855.

179. *Id.* Unfortunately, because the isolated conduct fell readily within even the narrowest definition of import commerce, the court was not able to analyze the oft-litigated question of whether alleged conduct "involved import commerce." *See infra* Section III.A. (discussing the different interpretations regarding whether conduct "involves import commerce").

Hartford Fire.¹⁸⁰ Indeed, the FTAIA served to codify *Alcoa*'s intended-effects test,¹⁸¹ and it would seem contrary to congressional intent to continue to apply the intended-effects test to import commerce that Congress specifically excluded from the FTAIA.¹⁸²

Regarding the allegations involving import commerce, the court held that the complaint "contain[ed] ample material," sufficient under the general requirements of *Hartford Fire*, to withstand a 12(b)(6) motion.¹⁸³ As to the other conduct within the complaint, such conduct, not being directly between foreign sellers and domestic buyers,¹⁸⁴ did not readily constitute import commerce and was thus subject to an FTAIA inquiry.

C. Directness

A third major issue that the Seventh Circuit addressed in *Minn-Chem* was the requisite nexus between the anticompetitive conduct and domestic effect. Recall that prong one of the domestic injury exception required that, for the Sherman Act to apply, the foreign conduct must have "a direct, substantial, and reasonably foreseeable effect" on domestic commerce. The *Minn-Chem* court set out to decipher the meaning of "direct."¹⁸⁵ In doing so, the court rejected the definition adopted by the Ninth Circuit.¹⁸⁶

In *United States v. LSL Biotechnologies*, the Ninth Circuit determined that the term "direct" required that an effect "follow[] as an immediate consequence of the defendant's activity."¹⁸⁷ The Ninth Circuit relied on *Republic of Argentina v. Weltover, Inc.*¹⁸⁸ In *Weltover*, the Supreme Court defined "direct" as used within the Foreign

180. *Minn-Chem*, 683 F.3d at 855.

181. See HOUSE REPORT, *supra* note 16, at 5.

182. Professor Bauer seems to agree with the court's analysis, as the continued application of the "*Alcoa Hartford Fire* standard" to import commerce would serve to alleviate fears of overapplication of the Sherman Act. Bauer, *supra* note 25, at 20–21; see also Beckler & Kirtland, *supra* note 26, at 14 ("Extraterritorial conduct that directly affects import commerce is analyzed under the Supreme Court's *Hartford Fire* test, not the FTAIA.").

183. *Minn-Chem*, 683 F.3d at 858.

184. For example, defendant Canpotex, Ltd., "a Canadian company that sold, marketed, and distributed potash throughout the world excluding the United States," was wholly owned, in equal shares, by three other defendants and was a major player in the execution of the cartel, albeit outside of North America. *Id.* at 850–51.

185. *Id.* at 856–58.

186. *Id.* at 857.

187. 379 F.3d 672, 680 (9th Cir. 2004) (emphasis added); see also *Lotes Co., Ltd. v. Hon Hai Precision Indus. Co.*, 2013 WL 2099227, at *7 (S.D.N.Y. May 14, 2013) (also adopting the "immediate consequence" definition of "direct").

188. *LSL Biotechnologies*, 379 F.3d at 680 (citing *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 618 (1992)).

Sovereign Immunities Act.¹⁸⁹ The *Weltover* Court “reject[ed] the suggestion that § 1605(a)(2) contains any unexpressed requirement of ‘substantiality’ or foreseeability.”¹⁹⁰ Had such terms been included, the substantiality or foreseeability language would have qualified the directness requirement.¹⁹¹

In rejecting the Supreme Court’s definition adopted by the Ninth Circuit, the Seventh Circuit noted that considerations of substantiality and foreseeability were explicitly incorporated into the FTAIA and may not be ignored.¹⁹² Judge Wood opted to embrace the Department of Justice Antitrust Division’s definition—that direct “means only ‘a reasonably proximate causal nexus.’”¹⁹³ As the court noted, it would be unworkable to build the notion of immediacy into a statutory phrase that includes such qualifiers as “substantial” and “foreseeable.”¹⁹⁴

Thus, the focus of the term “direct” is remoteness. The court quoted *Alcoa* for the proposition that congressional intent to punish foreign conduct too remote to its domestic effects should not be implied into the Sherman Act.¹⁹⁵ Therefore, “[j]ust as tort law cuts off recovery for those whose injuries are too remote from the cause of an injury, so does the FTAIA exclude from the Sherman Act foreign activities that are too remote from the ultimate effects on U.S. domestic or import commerce.”¹⁹⁶

Accordingly, regarding the non-import commerce, the court held that “[i]t is no stretch to say that the foreign supply restrictions, and the concomitant price increases forced upon the Chinese purchasers, were a direct—that is, proximate—cause of the subsequent price increases in the United States.”¹⁹⁷ As a result, the Seventh Circuit affirmed the

189. *Id.*; see also 28 U.S.C. § 1605(a) (2006).

190. 504 U.S. 607, 618 (1992).

191. *Id.*

192. *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 857 (7th Cir. 2012) (en banc).

193. *Id.* at 856–57 (quoting Makam Delrahim, *Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct*, 61 N.Y.U. ANN. SURV. AM. L. 415, 430 (2005)).

194. *Id.* at 857 (“Superimposing the idea of ‘immediate consequence’ . . . results in a stricter test than the complete text of the statute can bear. To demand a foreseeable, substantial, and ‘immediate’ consequence on import . . . commerce comes close to ignoring the fact that straightforward import commerce has already been excluded from the FTAIA’s coverage.”); see also HOUSE REPORT, *supra* note 16, at 5 (“United States antitrust laws should be applicable to an international transaction ‘when there is a substantial and foreseeable effect on the United States commerce’” (quoting ANTITRUST DIV., DEP’T. OF LABOR, ANTITRUST GUIDE TO INTERNATIONAL OPERATIONS 6–7 (1977))).

195. *Minn-Chem*, 683 F.3d at 857 (quoting *Alcoa*, 148 F.2d 416, 443 (2d Cir. 1945)). In turn, Judge Hand, in *Alcoa*, cited *American Banana* in making that same proposition. *Alcoa*, 148 F.2d at 443 (citing *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909)).

196. *Minn-Chem*, 683 F.3d at 857.

197. *Id.* at 859.

district court's denial of the defendants' motion to dismiss.¹⁹⁸

D. Significance

The Seventh Circuit's opinion in *Minn-Chem* is likely to have significance within the narrow realm of FTAIA case law. Much like the district court opinions in *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*¹⁹⁹ and *Dominicus Americana Bohio v. Gulf and Western Industries, Inc.*²⁰⁰ that thoroughly outlined pre-FTAIA case law, *Minn-Chem* examines the convoluted wording of the statute. Likewise, the participation of Judge Wood, Judge Richard Posner, and Judge Frank Easterbrook warrants deference in itself.²⁰¹ Others find satisfaction in the Seventh Circuit's broad treatment of import commerce and the directness requirement of the first prong of the FTAIA.²⁰² As a result, the FTAIA's impact in barring antitrust suits alleging foreign conduct is significantly limited, allowing for a more expansive extraterritorial application of the Sherman Act. Still, others even liken future significance to that of *Empagran I*.²⁰³ Most important, for purposes of this Note, the Seventh Circuit's decision highlights the misconceptions of *Empagran II* and its progeny, and this Note will continually revisit the Seventh Circuit's interpretations below.

III. REINTERPRETING THE LANGUAGE OF THE FTAIA

As a brief reminder, the language of the FTAIA begins with the exclusionary rule, which removes all non-import foreign conduct from

198. *Id.*

199. 494 F. Supp. 1161, 1180–89 (E.D. Pa. 1980).

200. 473 F. Supp. 680, 687–88 (S.D.N.Y. 1979).

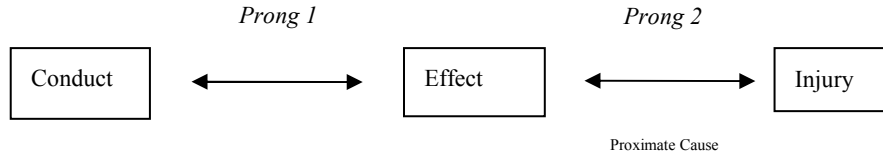
201. Judge Wood, the author of the opinion, has served as Deputy Assistant General in the Antitrust Division of the Department of Justice, has worked on the project to revise the Department of Justice Antitrust Guide for International Operations and has published a number of works regarding antitrust law, specifically international antitrust issues. Diane P. Wood Faculty Biography, U. CHI. L. SCH., <http://www.law.uchicago.edu/faculty/wood-d> (last visited Feb. 21, 2013). Judge Posner, among other things, is an antitrust scholar and leader in the field of law and economics. Richard A. Posner Faculty Biography, U. CHI. L. SCH., <http://www.law.uchicago.edu/faculty/posner-r> (last visited Feb. 21, 2013). Chief Judge Easterbrook is similarly well-known for antitrust scholarship. Frank H. Easterbrook Faculty Biography, U. CHI. L. SCH., <http://www.law.uchicago.edu/node/514/publications> (last visited Feb. 21, 2013).

202. See Bauer, *supra* note 25, at 20 (“This decision marks a healthy re-direction of FTAIA’s exclusion of actions challenging foreign behavior . . .”). Professor Bauer expresses concern that the panel decision, among decisions by other courts, served to expand the FTAIA and bar antitrust relief for private plaintiffs. *Id.* at 19. However, the en banc decision honed in the FTAIA, allowing for the antitrust laws to continue to “apply when th[e] behavior impacts domestic commerce and harms domestic consumers.” *Id.* at 20.

203. CPI Interview, *supra* note 85 (audio file at 0:03:05).

the reach of the Sherman Act.²⁰⁴ The FTAIA then sets forth the domestic-injury exception, which brings certain conduct back within the reach of the Sherman Act if the conduct satisfies two prongs. Prong one governs the relationship between the foreign conduct and domestic effect and requires that, for the Sherman Act to apply, the conduct must have a “direct, substantial, and reasonably foreseeable effect” on domestic commerce.²⁰⁵ Prong two governs the relationship between the effect and injury and requires that the effect from prong one must “give[] rise to” the plaintiff’s injury.

A peculiar result comes to light when combining the holding of the Seventh Circuit in *Minn-Chem* with that of the D.C. Circuit in *Empagran II*. Recall that the third critical interpretation in *Minn-Chem* speaks to the language of the first prong.²⁰⁶ Specifically, the *Minn-Chem* court concluded that the term “direct” within “direct, substantial, and reasonably foreseeable” necessitates a proximate cause relationship between the foreign conduct and the domestic effect.²⁰⁷ Therefore, a foreign actor engaging in anticompetitive conduct abroad may be haled into U.S. court for violations of the Sherman Act if the conduct proximately causes an adverse domestic effect and the effect satisfies the second prong of the domestic-injury exception.²⁰⁸



Similarly, recall that *Empagran II* provided that the language of the second prong “indicates a direct causal relationship, that is proximate cause.”²⁰⁹ Therefore, as in *Empagran II*, where a foreign plaintiff alleges foreign injury as a result of foreign conduct, the foreign injury must be proximately related to an adverse domestic effect.²¹⁰

204. See *supra* Subsection I.B.1.

205. *Empagran I*, 542 U.S. at 158–59.

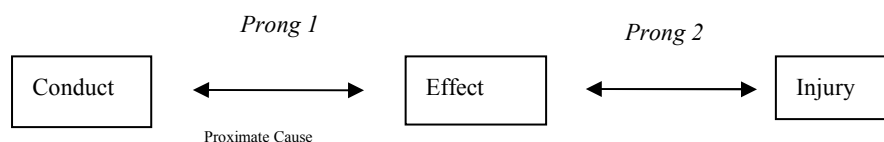
206. See *supra* Section II.C.

207. See *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 856–58 (7th Cir. 2012) (en banc), cert. dismissed, No. 12-650, 2013 WL 3790907 (U.S. July 22, 2013).

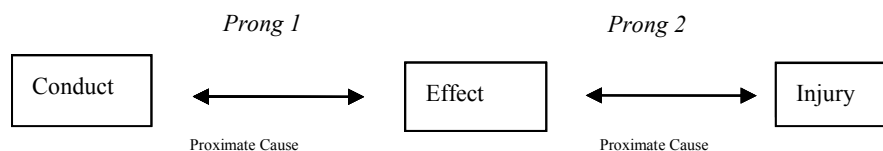
208. See *id.*; *supra* notes 13–15 and accompanying text.

209. *Empagran II*, 417 F.3d 1267, 1271 (D.C. Cir. 2005). Specifically, the court held that the “gives rise to” language of the second prong necessitates a proximate cause standard. *Id.*

210. *Id.*



As a result of combining *Empagran II* and *Minn-Chem*, both the first and second prongs of the FTAIA would require a proximate cause inquiry. Within the first prong, foreign conduct must be proximately related to a domestic effect, and within the second prong, the injury must be proximately related to the domestic effect.



This proximate cause overload raises the question of whether the two opinions should be read together. And if not, is one more correct than the other?

A. The Opening Phrase: Exclusionary Rule and Import Commerce

To properly evaluate such an inquiry, one must begin with the language of the FTAIA, moving from the opening phrase, to the first prong, then to the second prong.²¹¹ In its full text, the opening phrase provides “[s]ections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations.”²¹² Read together, the opening phrase outlines the general exclusionary rule, moving foreign non-import trade or commerce outside of the reach of the Sherman Act.²¹³

As to the wording itself, the phrase, “[s]ections 1 to 7 of this title,” refers to the Sherman Act.²¹⁴ Following is the phrase, “conduct involving trade or commerce . . . with foreign nations.”²¹⁵ Although not

211. See *Minn-Chem*, 683 F.3d at 853 (“Although the FTAIA has been parsed in a number of judicial opinions, including notably *Empagran*, we think it important to begin with the language of the statute . . .”).

212. 15 U.S.C. § 6a (2006).

213. See *Empagran I*, 542 U.S. 155, 158 (2004).

214. See Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1–7).

215. 15 U.S.C. § 6a. It is important to note that the “with foreign nations” language does not require that the anticompetitive conduct be with a foreign sovereign. *United States v. Holliday*, 70 U.S. 407, 417 (1865). Rather, the “with foreign nations” requirement covers

normally a point of contention, the Seventh Circuit in *Minn-Chem* evaluated whether the alleged conduct *involved* foreign trade or commerce.²¹⁶ The court held that the allegations of successful price increases by an “international cartel in a commodity” sufficed as conduct involving foreign trade or commerce.²¹⁷ Indeed, questions of involvement in foreign commerce are rarely discussed in FTAIA jurisprudence.

The “involvement” terminology does, however, come into contention when outlining the statute’s import commerce exclusion.²¹⁸ Removed from prior analysis, the parenthetical in the opening phrase provides that the Sherman Act “shall not apply to conduct involving trade or commerce (other than import trade or import commerce).”²¹⁹ Termed the “import commerce exclusion,”²²⁰ the parenthetical serves to remove import commerce from an FTAIA inquiry.²²¹ However, some conflict arises in evaluating the statute’s treatment of conduct involving import commerce. As previously discussed, the Seventh Circuit, in *Minn-Chem*, took issue with the Third Circuit’s characterization of the exclusion as an “import exception.”²²²

The Seventh Circuit’s concern was proper for a number of reasons. First, the “exception” language of the Third Circuit²²³ implies that import commerce initially falls within the purview of the FTAIA but is subsequently removed by action of the statute. Such a treatment is incorrect. Congressional intent was to only include export, or at least transactions “other than import” trade, in the FTAIA’s general exclusionary rule.²²⁴ A private practitioner, testifying before the Judiciary Committee, noted that “it is important that . . . import restraints, which can be damaging to American consumers, remained covered by the [Sherman Act].”²²⁵ The legislative history makes clear through repetition that the FTAIA applies only to the “export business

conduct involving foreign entities and individuals. *Id.* (“Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals.”).

216. *Minn-Chem*, 683 F.3d at 856.

217. *Id.*; see also *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 395 (2d Cir. 2002) (“[W]hen there is conduct directed at reducing the competitiveness of a foreign market . . . such conduct involves foreign trade or commerce . . .”).

218. Specifically, the import commerce exclusion focuses on whether the conduct “involv[es] . . . import commerce.” 15 U.S.C. § 6a.

219. *Id.*

220. See *Minn-Chem*, 683 F.3d at 855 (labeling as the “import commerce exclusion”).

221. See 1 KINTNER TREATISE, *supra* note 74, § 7.3, at 21 (“[I]f defendant’s conduct *only* involves import trade, that conduct remains subject to the Sherman Act . . .”).

222. See *supra* note 176 and accompanying text.

223. *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 466 (3d Cir. 2011).

224. HOUSE REPORT, *supra* note 16, at 10.

225. *Id.* at 9.

community.”²²⁶ Similarly, a strict construction of the import commerce exclusion is required to maintain a distinction between the domestic-injury exception’s treatment of import commerce and the exclusion’s treatment. Therefore, conduct involving import commerce is never to reach an FTAIA inquiry and is more properly termed an exclusion than an exception.

Interpreting the text of the parenthetical, one thing is clear: conduct must “involve” import commerce to be excluded from an FTAIA inquiry.²²⁷ This analysis—whether conduct involves import commerce—is different than the inquiry under prong one of the domestic-injury exception—whether the conduct has a “direct, substantial, and reasonably foreseeable” effect on import commerce.²²⁸ A commonly cited definition of “import” states that the term “generally denotes a product (or perhaps a service) [that] has been brought into the United States from abroad.”²²⁹ Another oft-quoted authority provides that import commerce refers to “transactions in which the seller is located abroad while the buyer is domestic and the goods flow into the United States.”²³⁰ Both the Third and Second Circuits hint that conduct may need to be “directed at an import market” to sufficiently involve import commerce.²³¹ Similarly, it is the conduct of the defendants, not

226. *Id.* at 7.

227. See *Turicentro, S.A. v. Am. Airlines, Inc.*, 303 F.3d 293, 302–03 (3d Cir. 2002); *Fond du Lac Bumper Exch., Inc. v. Jui Li Enter. Co.*, 795 F. Supp. 2d 847, 850 (E.D. Wis. 2011); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. MD 06-1775(JG)(VVP), 2008 WL 5958061, at *11–12 (E.D.N.Y. Sept. 26, 2008).

228. See *CSR Ltd. v. Cigna Corp.*, 405 F. Supp. 2d 526, 539 (D.N.J. 2005) (citing *Carpet Grp. Int’l v. Oriental Rug Imps. Ass’n*, 227 F.3d 62, 72 (3d Cir. 2000)); see also *Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd.*, No. 08-CV-42 (JG)(VVP), 2011 WL 7053807, at *35–36 (E.D.N.Y. Jan. 4, 2011) (“Two types of Sherman Act claims that implicate import trade or import commerce fall outside the scope of the FTAIA”: (1) conduct involving import commerce and (2) conduct that has a “direct, substantial, and reasonably foreseeable effect” on import commerce). The import commerce exclusion requires that foreign conduct that involves import commerce be excluded from an FTAIA inquiry and subject to the Sherman Act. On the other hand, foreign conduct that does not involve import commerce, but nonetheless has a “direct, substantial, and reasonably foreseeable effect” on import commerce, falls within the domestic-injury exception, given that it also satisfies the second prong, and is still subject to the Sherman Act.

229. *Turicentro*, 303 F.3d at 303; see also WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1135 (3d ed. 1993) (defining “import” as “something . . . brought in from an outside source”); BLACK’S LAW DICTIONARY 823 (9th ed. 2009) (defining “import” as a “product brought into a country from a foreign country where it originated”).

230. 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 272i, at 290 (3d ed. 2006).

231. See *Turicentro*, 303 F.3d at 303 (quoting *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 395 (2d Cir. 2002)); see also *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011) (citing the same proposition with approval). The same test can also be

the plaintiffs, that is scrutinized when determining whether the conduct involves import commerce.²³² Generally speaking, conduct involving the flow of goods or services into the United States from abroad will be excluded from an FTAIA inquiry as a result of the parenthetical.²³³

Should the conduct fall within the import commerce exclusion, U.S. antitrust laws may only apply if the complaint satisfies the common law tests derived from *Alcoa* and *Hartford Fire*.²³⁴ As discussed, this result seems peculiar, given that the FTAIA attempted to codify *Alcoa*.²³⁵ Regardless, the weight of authority seems to be in favor of the continued application of the common law tests to conduct involving import commerce,²³⁶ and such an interpretation is necessary to ensure that conduct involving import commerce does not remain without a standard.

Therefore, should a foreign actor engage in anticompetitive behavior involving the shipment of goods into the United States, the conduct will not be subject to an FTAIA inquiry. Rather, pursuant to the intended-effects test from *Alcoa*, a plaintiff must demonstrate that the conduct affected a United States market and that the foreign actor intended to do so. If successful, the issue may proceed to the merits of a Sherman Act claim.

worded as requiring that a defendant's conduct "target import goods or services." *Id.* On petition for writ of certiorari, the defendants in *Minn-Chem* meagerly attempted to articulate a circuit split between the interpretation of the Second and Third Circuits and that of the Seventh Circuit. Petition for Writ of Certiorari at 17–18, *Minn-Chem, Inc. v. Agrium, Inc.*, No. 12-650 (U.S. Nov. 23, 2012). As a requirement, such a standard—that conduct must be "directed at" import commerce to fall within the exclusion—would seem to blur the distinction between the import exclusion and the first prong of the domestic-injury exception. Indeed, both share the term "direct," although used in different capacities.

232. *Turicentro*, 303 F.3d at 303 (citing *Kruman*, 284 F.3d at 395).

233. *Fond du Lac Bumper Exch., Inc. v. Jui Li Enter. Co.*, 795 F. Supp. 2d 847, 849–51 (E.D. Wis. 2011) (holding that the defendants' conduct involved import commerce where defendants were Taiwanese manufacturers of "sheet metal aftermarket auto parts" and their "alleged conspiracy focused on setting the prices of parts that were manufactured for the purpose of being sold in the United States and that such parts were in fact sold in the United States," regardless of whether defendants had transferred title of the parts abroad); *Precision Assocs.*, 2011 WL 7053807, at *36 (holding that defendants' alleged conduct involved import commerce where "[t]he freight forwarding service at issue . . . is the business of obtaining money for placing goods into the flow of commerce into and out of the United States"); *cf. In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. C 07-05634 CRB, 2011 WL 1753738, at *4 (N.D. Cal. May 8, 2011) (holding that anticompetitive conduct in commercial air transportation did not involve import commerce: "[i]t is too great a leap to equate air passenger travel with the importing of people"); *CSR Ltd.*, 405 F. Supp. 2d at 541–42 (holding that the defendants' conduct did not involve import commerce for a multitude of reasons).

234. *See Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 855 (7th Cir. 2012) (en banc).

235. *See supra* note 180–82 and accompanying text.

236. *See supra* note 182.

B. *Prong One of the Domestic-Injury Exception: Conduct and Effect*

Following the opening phrase, the first section of the FTAIA contains the first prong of the domestic-injury exception. Specifically, the statute provides that the Sherman Act does not apply to foreign, non-import conduct unless:

(1) such conduct has a *direct, substantial, and reasonably foreseeable effect*—(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States.²³⁷

Much discussion has focused on the “direct, substantial, and reasonably foreseeable effect” language.²³⁸ The precise goal of the phrase is to “serve as a simple and straightforward clarification of existing American law and the Department of Justice enforcement standards.”²³⁹ Deemed the “domestic-injury exception,” the phrase adheres to *Alcoa*’s principle that “it is the situs of the effects as opposed to the conduct, that determines whether United States antitrust law applies.”²⁴⁰ Specifically, the language seeks to determine the “quantum and nature of the effects” required to apply U.S. antitrust laws to foreign conduct.²⁴¹

In breaking down the language of the first prong, interpretation of the term “direct” has resulted in a circuit split. As discussed above,²⁴² the Ninth Circuit relied on the Supreme Court’s interpretation of the term “direct” as relating to the Foreign Sovereign Immunities Act, requiring that the domestic effect be an “immediate consequence” of the anticompetitive conduct.²⁴³ The Seventh Circuit rejected the Ninth Circuit’s interpretation because the other wording of the statute serves to qualify the directness requirement.²⁴⁴ Instead, the Seventh Circuit relied on the Department of Justice’s interpretation and held that “direct” implied a proximate cause nexus.²⁴⁵

237. 15 U.S.C. § 6a(1) (2006) (emphasis added).

238. See, e.g., HOUSE REPORT, *supra* note 16, at 2.

239. *Id.*

240. *Id.* at 5.

241. *Id.*

242. See *supra* Section II.C.

243. *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004); see also *Lotes Co. v. Hon Hai Precision Indus. Co.*, No. 12 Civ. 7465(SAS), 2013 WL 2099227, at *7 (S.D.N.Y. May 14, 2013).

244. *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 856–57 (7th Cir. 2012) (en banc).

245. *Id.*

The Seventh Circuit's confidence in the Department of Justice was well-grounded. The FTAIA's legislative history approvingly cites authority from the Department of Justice on several occasions.²⁴⁶ Furthermore, the legislative history refers to the "direct, substantial, and reasonably foreseeable effect" requirement as a "single, objective test."²⁴⁷ Therefore, "direct" should not be isolated, but rather should be read in conjunction with the entire phrase. When read together, the term "direct" clearly requires a proximate cause nexus between the foreign conduct and domestic effect.²⁴⁸ According to Justice Scalia, where "direct" is found within a statute to be unaccompanied by "substantiality" or "foreseeability" requirements, "direct" requires that an effect be an "immediate consequence" of the defendant's conduct.²⁴⁹ However, this is not the case within the FTAIA. In the first prong, "direct" is followed by requirements that the domestic effect be "substantial[] and reasonably foreseeable."²⁵⁰

As to the substantiality and foreseeability requirements, there is little guidance from the courts. However, the substantiality requirement may serve to incorporate additional factors, such as comity.²⁵¹ Recall that before the enactment of the FTAIA, several courts of appeals applied a balancing test to determine the extraterritorial reach of U.S. antitrust laws.²⁵² For example, the Ninth Circuit's tripartite analysis required a balancing of "the relative significance of effects on the United States" with notions of international comity.²⁵³ It is within the term "substantial" where *Empagran I*'s revitalization of the comity factor may be found.²⁵⁴ Specifically, the term "substantial" implies a comparison. In that sense, the analysis may require that the domestic effect be "substantial" in relation to comity concerns to warrant extraterritorial application of U.S. antitrust laws.

The "reasonably foreseeable" provision replaces *Alcoa*'s

246. See HOUSE REPORT, *supra* note 16, at 5.

247. *Id.* at 2.

248. Cf. BLACK'S LAW DICTIONARY 525 (9th ed. 2009) (including immediacy in defining "direct").

249. Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 618 (1992).

250. 15 U.S.C. §6a (2006).

251. Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 612 (9th Cir. 1976) ("[T]he requirement for a 'substantial' effect may silently incorporate [comity] considerations, with 'substantial' as a flexible standard that varies with other factors.").

252. See *supra* Subsection I.A.2. (discussing the post-*Alcoa* balancing tests).

253. *Timberlane*, 549 F.2d at 614.

254. In *Empagran I*, Justice Breyer did not find considerations of comity within the wording of the statute. 542 U.S. 155, 164 (2004). Rather, Justice Breyer held that comity considerations could be read into the statute by way of a canon of statutory construction. *Id.* ("[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with sovereign authority of other nations.").

requirement of intent.²⁵⁵ Indeed, the condition is broader than a general intent standard and serves to avoid inquiries into defendants' subjective intent.²⁵⁶ The objective nature operates "to promote certainty in assessing the applicability of American antitrust law."²⁵⁷ Accordingly, "the relevant inquiry is whether the alleged domestic effect would have been evident to a reasonable person making practical business judgments."²⁵⁸

Having evaluated the "substantial" and "reasonably foreseeable" requirements, it is clear that those terms serve to qualify the directness wording. Therefore, the "immediate consequence" definition of direct, adopted by the Ninth Circuit, is too narrow. As a result, the directness requirement moves down the causation spectrum to a slightly more attenuated standard—proximate cause. Thus, the Seventh Circuit's interpretation is correct. In application, the first prong of the domestic-injury exception of the FTAIA requires that a domestic effect be proximately related to the foreign conduct.

Apart from the "direct, substantial, and reasonably foreseeable" language at the beginning of the first prong, the section concludes by defining the relevant markets. Specifically, the effect must be:

- (A) on trade or commerce which is not trade or commerce with foreign nations [i.e., domestic trade or commerce], or on import trade or import commerce with foreign nations; or
- (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States.²⁵⁹

As noted above, the requirement that the foreign conduct have a "direct, substantial and reasonably foreseeable effect" on "import trade or import commerce" is to be distinguished from the requirements of the import trade exclusion.²⁶⁰

Another minor point of contention relates to market definition. Specifically, the question arises as to whether the "effect" on "commerce" requirement in the first prong necessitates an effect on the

255. See HOUSE REPORT, *supra* note 16, at 9.

256. See *id.* ("The subcommittee chose a formulation based on *foreseeability* rather than *intent* to make the standard an objective one and to avoid . . . inquiries into the actual, subjective motives of defendants."); see also *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 471 (3d Cir. 2011) ("[T]he FTAIA's effects exception does not contain a 'subjective intent' requirement.").

257. HOUSE REPORT, *supra* note 16, at 9.

258. *Animal Sci.*, 654 F.3d at 471.

259. 15 U.S.C. §6(a)(1) (2006).

260. See *supra* note 172 and accompanying text.

broad market or merely an effect on the plaintiff.²⁶¹ Several decisions require that the effect be on the market.²⁶² However, in the case of a domestic plaintiff alleging domestic injury, some courts have found the plaintiff's injury to suffice as the required domestic effect, blurring the distinction between the first and second prongs of the domestic-injury exception.²⁶³ Indeed, it seems simple enough for a domestic plaintiff to plead that any injury upon the plaintiff, as a market participant, is an effect upon the domestic market.

C. Prong Two of the Domestic-Injury Exception: Effect and Injury

While the first prong lays out the requisite relationship between the conduct and effect, the second prong governs the relationship between the effect and injury. The distinction between conduct, effect, and injury becomes apparent in a factual scenario similar to that in *Empagran I* and *II*, with a foreign plaintiff alleging foreign conduct, domestic effect, and foreign injury.²⁶⁴ As to the wording of the statute, the second prong provides that the Sherman Act does not apply to non-import commerce with foreign nations unless the effect from prong one "gives rise to a claim under the provisions of" the Sherman Act.²⁶⁵ There is limited legislative history describing the language of the second prong. However, the legislative history does clarify that beneficial domestic effects are insufficient to satisfy the domestic-injury exception.²⁶⁶ "[T]he domestic 'effect' that may serve as the predicate for antitrust jurisdiction under the bill must be of the type that the antitrust laws

261. See *McLafferty v. Deutsche Lufthansa A.G.*, 2009 WL 3365881, at *4 (E.D. Pa. Oct. 16, 2009) (addressing the plaintiff's theory that the payment of supra-competitive prices in the United States for plane tickets between two foreign locations was a sufficient effect on U.S. commerce under prong one of the FTAIA and holding that "[t]he fact that the supra-competitive prices were paid by persons in the United States does not establish, or even intimate, that the conspiracy directly effected United States commerce" (footnote omitted)). The issue arises where a domestic plaintiff contends that her injury suffices as the requisite domestic effect. *Id.*

262. See, e.g., *In re Intel Corp. Microprocessor Antitrust Litig.*, 476 F. Supp. 2d 452, 456 (D. Del. 2007) (agreeing with the plaintiffs that the "appropriate focus . . . is the effect on commerce and not the effect on any particular plaintiff"); *CSR Ltd. v. Cigna Corp.*, 405 F. Supp. 2d 526, 546 (D.N.J. 2005) (requiring a market effect in the United States).

263. See, e.g., *SRAM*, 2010 WL 5477313, at *5 (N.D. Cal. Dec. 31, 2010) (holding that the plaintiffs' purchase of "static random access memory" at supra-competitive prices in the U.S. was sufficient to satisfy prong one of the FTAIA).

264. *Empagran I*, 542 U.S. 155, 158 (2004); *Empagran II*, 417 F.3d 1267, 1269 (D.C. Cir. 2005).

265. 15 U.S.C. § 6a(2) (2006).

266. HOUSE REPORT, *supra* note 16, at 11; see also *Empagran I*, 542 U.S. 155, 174 (2004) (explaining that Congress included the "gives rise to a claim" language "for a . . . neutral reason, namely, in order to make clear that the domestic effect must be an *adverse* (as opposed to a beneficial) effect").

prohibit.”²⁶⁷ This much is clear from a facial reading of the second prong.

The language of the second prong mentions “a claim.”²⁶⁸ It is even unclear whether the term “claim” within the second prong refers to the plaintiff’s injury. Indeed, as the Second Circuit noted, the Sherman Act does not speak to civil actions, and there is no mention of an injury requirement for a private plaintiff.²⁶⁹ Rather, the Clayton Act allows for a civil action by a private plaintiff where that person is “injured . . . by reason of *anything forbidden in the antitrust laws*.”²⁷⁰ Therefore, private recovery under the Clayton Act is dependent upon violation of the Sherman Act, and it may not be unreasonable to read the second prong of the FTAIA as requiring that the domestic effect “gives rise to [the plaintiff’s injury].” That argument is bolstered by the Supreme Court’s reference to “injury” throughout its opinion in *Empagran I*.²⁷¹

Prior to the Court’s landmark decision in *Empagran I*, a circuit split had developed as to the proper interpretation of the second prong.²⁷² The Fifth Circuit strictly held that “the effect on United States commerce . . . must give rise to the claim that [the plaintiff] asserts against the defendants.”²⁷³ In contrast, the Second Circuit held that the second prong only requires that the domestic effect give rise to a claim under the Sherman Act, not necessarily the plaintiffs.²⁷⁴ The Court resolved the issue in favor of the Fifth Circuit’s approach, holding that “Congress would not have intended the FTAIA’s exception to bring

267. HOUSE REPORT, *supra* note 16, at 11 (“The Committee did not believe that the bill reported by the Subcommittee was intended to confer jurisdiction on injured foreign persons when that injury arose from conduct with no anticompetitive effects in the domestic marketplace.”).

268. 15 U.S.C. § 6a(2).

269. *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 397 (2d Cir. 2002).

270. 15 U.S.C. § 15 (emphasis added).

271. *Empagran I*, 542 U.S. at 175; *see also Empagran S.A. v. F. Hoffman La-Roche, Ltd.*, 315 F.3d 338, 349–50 (D.C. Cir. 2003), (“[T]he language is far from clear as to whether [the ‘gives rise to’] requirement can be satisfied merely by a violation of the Sherman Act, rather than by antitrust injury to the plaintiffs . . . [who] bring a claim under the provisions of the Clayton Act . . .”) *vacated*, *Empagran I*, 542 U.S. 155 (2004).

272. *See* 1 KINTNER TREATISE, *supra* note 74, § 7.3, at 22 (discussing the circuit split); *see also Empagran S.A.*, 315 F.3d at 349 (“[B]oth the Second Circuit and the Fifth Circuit found the “gives rise to a claim” language of § 6a(2) to be plain in opposite ways . . .”).

273. *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 427 (5th Cir. 2001). In other words, “the effect of the defendant’s conduct on the American market must give rise to the plaintiff’s *specific* claim.” 1 KINTNER TREATISE, *supra* note 74, § 7.3, at 22 (emphasis added).

274. *Sniado v. Bank Austria AG*, 352 F.3d 73, 78 (2d Cir. 2003) (citing 284 F.3d 384, 400); *see also Metallgesellschaft AG v. Sumitomo Corp.*, 325 F.3d 836, 840 (7th Cir. 2003) (failing to determine the issue but noting that Seventh Circuit case law may favor the Second Circuit’s broader approach).

independently caused foreign injury within the Sherman Act's reach."²⁷⁵

On remand, the D.C. Circuit was tasked with determining the required relationship between the "adverse domestic effect" and the plaintiffs' "foreign injury."²⁷⁶ The court rejected arguments in favor of a but-for nexus and held that the "gives rise to" language of the second prong requires a proximate cause relationship.²⁷⁷ The D.C. Circuit's determination is notoriously void of justification.²⁷⁸ In fact, the court only briefly provided a comity explanation for its adoption of a "proximate cause standard."²⁷⁹ Despite the lack of basis, a number of courts have adopted the D.C. Circuit's proximate cause requirement for the second prong of the FTAIA.²⁸⁰ Additionally, some courts have adhered to timing requirements regarding effect and injury.²⁸¹ At least one court has required that the plaintiff's foreign injury occur subsequent to the domestic effect.²⁸² In contrast, other courts are satisfied if the foreign injury occurs simultaneous to a domestic effect.²⁸³

IV. DETERMINING THE CORRECT STANDARD FOR PRONG TWO

Having established that the use of "direct" within the first prong necessitates a proximate cause nexus and that many courts have required a proximate cause nexus for the "gives rise to" wording of the second prong, the prior question arises: Do both prongs of the domestic-injury exception of the FTAIA require a proximate cause inquiry?

In light of the Seventh Circuit's determination in *Minn-Chem*, it would seem that the question must be answered in the negative. In fact, the Seventh's Circuit's decision further reveals the unsuitability of the D.C. Circuit's holding as to the second prong in *Empagran II*. This Part proceeds by rejecting *Empagran II*'s proximate cause requirement for the second prong and proposes a different standard: but-for causation.

A. Proximate Causation Is an Incorrect Standard

Admittedly, there does not seem to be anything inherently wrong

275. *Empagran I*, 542 U.S. at 173; see also 1 KINTNER TREATISE, *supra* note 74, § 7.3, at 22 ("The Supreme Court reversed, largely endorsing the Fifth Circuit's approach.").

276. *Empagran II*, 417 F.3d 1267, 1269 (D.C. Cir. 2005).

277. *Id.* at 1271.

278. See *supra* note 128.

279. *Empagran II*, 417 F.3d at 1271.

280. See *supra* note 130 (outlining *Empagran II* and its progeny).

281. See Bauer, *supra* note 25, at 18.

282. See *In re Hydrogen Peroxide Antitrust Litig.*, 702 F. Supp. 2d 548, 551 (E.D. Pa. 2010) ("[The] FTAIA imposes a two-step dance, first with one foot (the domestic effects) and then with the other (the foreign antitrust injury).").

283. See *In re Inter Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555, 562 (D. Del. 2006) (allowing for a simultaneous effect).

with requiring a direct cause relationship—proximate cause—at each step. In the case of a foreign plaintiff alleging foreign conduct, domestic effect, and foreign injury, the statute would provide that the Sherman Act does not apply to foreign conduct involving non-import commerce unless defendant’s foreign conduct proximately caused a domestic effect,²⁸⁴ and the domestic effect proximately caused the plaintiff’s foreign injury.

Similarly, in the case of a domestic plaintiff alleging foreign conduct and a domestic effect that is the plaintiff’s domestic injury, the statute may read that the Sherman Act does not apply to foreign conduct involving non-import commerce unless the foreign conduct is proximately related to a domestic effect, which is also the plaintiff’s domestic injury. This analysis would depend on whether the court requires an effect on the market or whether an effect on a domestic plaintiff is sufficient.²⁸⁵

While simple enough to apply, such an interpretation seems to stray from congressional intent. Indeed, had Congress sought the same analysis at each step, there would be some degree of uniformity within the language. More significantly, the legislative history does not speak to a separate inquiry as to the relationship between the effect and the injury. In fact, the legislative history states that the “gives rise to” language of the second prong serves merely to ensure that the alleged domestic effect constitutes an adverse, as opposed to beneficial, effect.²⁸⁶ The Supreme Court in *Empagran I* noted this much.²⁸⁷ It would seem that the courts, especially *Empagran II* and its progeny, have afforded too much emphasis to the second prong.

In *Empagran II*, the D.C. Circuit’s lack of basis in developing the proximate cause standard certainly does not weigh in its favor. In fact, the court seemed to have pulled the requirement from thin air.²⁸⁸ Courts that have followed the D.C. Circuit’s interpretation have failed to expand significantly upon the D.C. Circuit’s analysis. The Eighth Circuit wholly agreed with the D.C. Circuit’s proximate cause standard, justifying its reasoning on comity and the FTAIA’s language and history.²⁸⁹ The Ninth Circuit followed suit, adding that “the proximate

284. For the purposes of analysis going forward, this Note ignores the other requirements of the first prong—substantiality and foreseeability.

285. See *supra* notes 261–63 and accompanying text.

286. See *supra* note 258 and accompanying text.

287. 542 U.S. 155, 174 (2004) (determining that the second section of the FTAIA exists only for a “neutral reason”).

288. *Empagran II*, 417 F.3d 1267, 1271 (D.C. Cir. 2005).

289. *MSG*, 477 F.3d 535, 539 (8th Cir. 2007). The Eighth Circuit properly cites *Empagran I* for the proposition that the FTAIA sought to clarify, not expand, the reach of the Sherman Act. *Id.* Similarly, the court correctly noted that there is no relevant case law prior to the FTAIA where the Sherman Act applied to a foreign injury based on “indirect causation.” *Id.* The Eighth

cause standard is consistent with general antitrust principles, which typically require a direct causal link between the anticompetitive practice and the plaintiff's damages."²⁹⁰ Neither of these justifications is convincing, and both decisions fail to set forth a concrete basis for requiring a proximate cause relationship.

Comity does not require such a strict standard of directness. Balancing the interests of the United States in regulating conduct that has a domestic effect with the risk of interference "with a foreign nation's ability to independently regulate its own commercial affairs," provides the common sense conclusion that plaintiffs alleging foreign injury independent of the domestic effect have no remedy in U.S. courts.²⁹¹ However, courts should not go as far as to require proximate cause in the name of comity. Requiring such a hurdle for foreign plaintiffs experiencing foreign injury does little more than overburden potential plaintiffs that have a legitimate link to the United States. Providing redress in U.S. courts may even ease pressures on foreign sovereigns unable to provide sufficient remedies for harm that their citizens experience. Any objections by foreign sovereigns are to be taken in stride, as they will naturally object to any extraterritorial application of U.S. laws.

Globalization of commerce requires a less stringent standard. In light of the practical dissolution of national borders in modern trade and commerce,²⁹² distinctions between location of conduct, effect, and injury become less relevant. Particularly, proving a direct causal link between a domestic effect and a plaintiff's injury is unnecessary. Rather, should a plaintiff sufficiently articulate a lesser nexus, a closer nexus may be presumed based on the interconnectedness of modern commerce.²⁹³ Requiring a plaintiff to articulate the complexities of a proximate cause relationship will prove unwarrantedly burdensome, especially in light of the increased probability of the existence of such a

Circuit faltered in its comparison of but-for causation and indirect causation. *Id.* While but-for causation is certainly less direct than proximate causation, it does not represent complete indirectness. A standard of complete indirectness, i.e., independence, was rejected by the Court in *Empagran I*, 542 U.S. at 164. Furthermore, as to be discussed, the language of the statute does not require such a level of directness.

290. *DRAM*, 546 F.3d 981, 988 (9th Cir. 2008); see also *Latino Quimica-Amtex S.A. v. Akzo Nobel Chem. B.V.*, 2005 WL 2207017, at *8 (S.D.N.Y. Sept. 8, 2005) ("[T]he proximate causation standard . . . is consistent with antitrust principles requiring that an antitrust injury-in-fact be caused directly by a defendant's conduct.").

291. *Empagran I*, 542 U.S. at 165.

292. See Goodno, *supra* note 34, at 1140 ("The world is becoming a smaller place. Technology and the internet have made global travel and communication easier, quicker, and more common.").

293. While this argument may render the second prong irrelevant, it is argued above, *supra* notes 286–87, that courts have been reading into the second prong too much. Therefore, moving the second prong away from the spotlight may serve legislative intent.

relationship.

While courts may desire a closer nexus to preserve judicial resources, considerable barriers to antitrust relief for foreign conduct already exist. One of the most significant antitrust claims involving foreign conduct may now be subject to plausibility pleading requirements.²⁹⁴ Following the lead of the Third and Seventh Circuits, many other courts have held that the FTAIA raises a merits question, not a jurisdictional one.²⁹⁵ Following these decisions, a defendant must move to dismiss on FTAIA grounds under a 12(b)(6) motion to dismiss for failure to state a claim, as opposed to a 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction. Such a result will raise the bar for pleading, keeping more plaintiffs out of court. While a plaintiff no longer has the burden of proving jurisdiction following a 12(b)(1) motion, defendants will rely on 12(b)(6), and a plaintiff's complaint will be closely scrutinized, according to the *Twombly* and *Iqbal* pleading requirements.²⁹⁶ Filing a complaint with adequate facts may be nearly impossible without the benefit of discovery.²⁹⁷

Admittedly, the inquiry into the relationship between the domestic effect and foreign injury becomes relevant only in the rare circumstance where a foreign plaintiff alleges foreign conduct, domestic effect, and foreign injury. However, the inquiry is relevant for those foreign plaintiffs seeking redress for conduct that affects the United States. Through examination, it becomes evident that requiring a proximate cause relationship between the domestic effect and a plaintiff's injury is unnecessary and unduly burdensome.

B. *But-For Causation Is the Correct Standard*

As the proximate cause standard appears incorrect, a different standard may be presented. The proper inquiry under the second prong of the FTAIA's domestic-injury exception requires but-for causation. In application, the plaintiff's foreign injury must have occurred but for a domestic effect in order for the Sherman Act to apply. A but-for requirement is proper for a number of reasons.

The text of the FTAIA requires a but-for nexus. Recall that the Seventh Circuit determined that the term "direct" within the "direct, substantial, and reasonably foreseeable" phrase of the first prong requires a proximate cause requirement.²⁹⁸ When the phrase is read as a whole, the substantiality and foreseeability requirements serve to qualify the directness language. As such, the Seventh Circuit correctly

294. See *supra* Section II.A.

295. See *supra* notes 166–68 and accompanying text.

296. See *supra* notes 166–68 and accompanying text.

297. See Bauer, *supra* note 25, at 4–5.

298. See *supra* Section II.C.

determined that a proximate cause standard, as opposed to an even more stringent standard, was correct for the first prong.²⁹⁹ In comparison, there is no use of the word “direct” in the second prong. Unlike the directness requirement of the first prong, the “gives rise to” language of the second prong begins at the other end of the causation spectrum.³⁰⁰ Indeed, the language of the second prong invokes notions of broad application, and there is no language within the statute bringing it closer to a more direct standard. Therefore, on first glance, the language of the second prong approaches but-for causation, or even a lesser standard.³⁰¹

Congressional intent indicates a but-for standard.³⁰² Specifically, by adhering more closely to the text, a but-for requirement will provide for greater clarity.³⁰³ As noted above, had Congress intended a proximate cause standard to apply to the second prong, Congress would have provided for language similar to that of the first prong. The legislative history’s limited discussion on comity implies that the causal relationship between effect and injury may be minimal.

A but-for requirement will provide for a sufficient degree of

299. See *supra* Section III.B.

300. Corrected Brief for Appellants at 22–23, *Empagran II*, 417 F.3d 1267 (D.C. Cir. 2005) (No. 01-7115), 2005 WL 79117, at *22–23 (stating that “gives rise to” implies “but for” causation).

301. The Supreme Court rejected a *de minimis*-type standard when it held that “independently caused foreign injury” does not fall within the Sherman Act’s reach. *Empagran I*, 542 U.S. 155, 173 (2004). Similarly, the Court has already stretched the meaning of the statute beyond the literal text, and it would seem unlikely that the Court would seek to further hone the statute toward a stricter standard. See *id.* at 174 (“It also makes linguistic sense to read the words ‘a claim’ as if they refer to the ‘plaintiff’s claim’ or ‘the claim at issue.’”).

302. As *Empagran I* makes clear, Congress did not seek to expand extraterritorial application of the Sherman Act by enacting the FTAIA. *Id.* at 169. Those disfavoring a but-for causation standard point out that no case law prior to the enactment of the FTAIA required a lesser standard, i.e., but-for causation, in analyzing the connection between domestic effect and foreign harm. See Brief for the United States and the Federal Trade Commission as *Amicus Curiae* in Support of Defendants-Appellees in Response to Court Order of November 22, 2004 at 14–16, *Empagran II*, 417 F.3d 1267 (D.C. Cir. 2005) (No. 01-7115), 2005 WL 6488381, at *9, *14–16. Such arguments point out that but-for causation has never been sufficient to determine antitrust standing or the link between conduct and injury. *Id.* These arguments fail to account for the narrowed inquiry of the second prong of the domestic-injury exception. The inquiry of the second prong of the domestic-injury exception, i.e., the link between domestic effect and injury, cannot be compared to standing requirements or the general link between conduct and injury. In fact, the pre-FTAIA intended-effects test seemed to stop after the first prong of the domestic-injury exception. See *Alcoa*, 148 F.2d 416, 444 (2d Cir. 1945) (holding that the intended-effects test required that both foreign anticompetitive conduct have an effect on domestic commerce and that the defendant intended to affect domestic commerce). Such confusion may be further evidence that courts have afforded too much emphasis on the second prong of the domestic-injury exception. See *supra* Section IV.A. (noting that courts have afforded too much emphasis on the second prong of the domestic-injury exception).

303. Clarity was a primary goal in enacting the FTAIA. See *supra* note 80 and accompanying text.

objective foreseeability. It is not unreasonable for a foreign defendant to expect to be haled into a U.S. court for foreign injuries that occurred but for an adverse effect in the United States. In light of increasing globalization, foreign defendants can assume that should their conduct cause adverse domestic effects in the United States, they may be liable for injuries incurred abroad.

But-for causation provides sufficient deference to foreign sovereigns. One must not forget that comity interests are already to be considered in the first prong of the domestic-injury exception,³⁰⁴ in linking the conduct to the effect.³⁰⁵ The United States undoubtedly has a significant interest in regulating conduct that affects domestic commerce. It logically follows that the United States has a strong interest in remedying injury that can be reasonably linked to that effect. Certainly, other nations cannot reasonably object to U.S. interference where a foreign injury results but for a domestic effect in the United States. Indeed, nations with similar effect requirements may be welcoming to U.S. redress where their citizens' injuries cannot be linked to an effect within their own country.

A but-for nexus does not encourage overbroad application of the Sherman Act. The FTAIA is only relevant to non-import commerce, and import commerce is still subject to the common law requirements under *Alcoa* and *Hartford Fire* for the Sherman Act to apply to foreign conduct.³⁰⁶ Similarly, some courts' timing requirements effectively bolster the causal link between the effect and injury.³⁰⁷

Lastly, a but-for causation requirement will serve to satisfy the goals of the Sherman Act. Among the many purposes of the Sherman Act, Congress sought to encourage competition and to protect consumers from injuries resulting from anticompetitive conduct.³⁰⁸ As compounded by the globalization of commerce, anticompetitive conduct can have broad and drastic effects on even the most localized consumers. Minimizing barriers to remedies, or at least removing unreasonable barriers, is directly in line with the goals of the Sherman Act.

Therefore, but-for causation is the correct standard for the second prong of the FTAIA's domestic-injury exception. Considerations of the

304. See *supra* Section III.B. (arguing that the substantiality requirement in the first prong of the domestic-injury exception necessitates a comity analysis).

305. Even with any growth of foreign antitrust regimes, their interests may be limited to the relationship between conduct and effect. It would be unreasonable for foreign regimes to complain of U.S. redress where the anticompetitive conduct had an effect on U.S. markets.

306. See *supra* note 182.

307. See *supra* notes 281–87 and accompanying text.

308. See *Fond du Lac Bumper Exch., Inc. v. Jui Li Enter. Co.*, 795 F. Supp. 2d 847, 850 (E.D. Wis. 2011) (“[T]he purpose of the Sherman Act is to protect consumers and businesses in the American marketplace from injuries arising from anticompetitive activity.”).

FTAIA's language and legislative history, among other factors, serve to substantiate a but-for causation requirement.

CONCLUSION

The application of U.S. antitrust laws abroad has resulted in much confusion since the infancy of the Sherman Act. Initial cases that dealt with the extraterritorial application of the Sherman Act provided for a broad spectrum of dispositions. Similarly, the prevailing test for much of the twentieth century was deemed incomplete by several courts of appeals. Unfortunately, congressional intervention did little to resolve the confusion or provide clarity to parties, practitioners, and the courts. In fact, the FTAIA's "rather convoluted language"³⁰⁹ has resulted in a multitude of disagreements as to interpretations of its provisions.

Fortunately, a select few cases do provide some clarity and guidance as to the interpretation of the FTAIA. In one of those cases, *Empagran I*, the Supreme Court granted certiorari on a relatively narrow issue, but nevertheless provided a great deal of insight as to other issues regarding the FTAIA. More recently, the Seventh Circuit's holding in *Minn-Chem* has afforded significant clarity as to several FTAIA issues. In doing so, the Seventh Circuit further revealed the inadequacy of a recent line of interpretations.

Empagran II and its progeny provide that the second prong of the domestic-injury exception of the FTAIA requires a proximate cause relationship between prong one's domestic effect and a plaintiff's foreign injury. By sufficiently justifying a proximate cause relationship for the first prong of the domestic-injury exception, the Seventh Circuit unearthed *Empagran II*'s shortcomings. It quickly becomes evident that proximate cause is not the correct standard for the second prong of the domestic-injury exception. Rather, this Note argues that a but-for nexus more properly defines the requisite relationship between prong one's domestic effect and plaintiff's foreign injury. Therefore, courts should abandon *Empagran II*'s holding in favor of but-for causation.

309. *Turicentro, S.A. v. Am. Airlines, Inc.*, 303 F.3d 293, 300 (2d Cir. 2002).